DOCKET

No. 08-351
Title: Anita Alvarez, Cook County State's Attorney, Petitioner
v.
Chermane Smith, et al.
Docketed: September 18, 2008
Lower Ct: United States Court of Appeals for the Seventh Circuit
Case Nos.: (07-1599)
Decision Date: May 2, 2008
Rehearing Denied: June 16, 2008
Questions Presented

Date	Proceedings and Orders
Sep 15 2008	Petition for a writ of certiorari filed. (Response due October 20, 2008)
Oct 9 2008	Waiver of right of respondent Chermane Smith to respond filed.
Nov 5 2008	DISTRIBUTED for Conference of November 25, 2008.
Nov 12 2008	Response Requested . (Due December 12, 2008)
Dec 2 2008	Order extending time to file response to petition to and including January 12, 2009.
Jan 9 2009	Brief of respondents Chermane Smith, et al. in opposition filed.
Jan 21 2009	DISTRIBUTED for Conference of February 20, 2009.
Feb 23 2009	Petition GRANTED limited to Question 1 presented by the petition.
Mar 25 2009	The time within which to file the joint appendix and petitioner's brief on the merits is extended to and including May 11, 2009.
Apr 27 2009	The time within which to file respondents' brief on the merits is extended to and including July 10, 2009.
May 5 2009	Notification pursuant to Rule 12.6 received from counsel for City of Chicago and Superintendent Jodi P. Weis.
May 8 2009	Consent to the filing of amicus briefs, in support of either party or neither party, received from counsel for the respondent.
May 11 2009	Joint appendix filed. Statement of costs received.
May 11 2009	Brief of petitioner Anita Alvarez, Cook County State filed.
May 13 2009	Consent to the filing of amicus curiae briefs in support of either party or neither party received from counsel for the petitioner.
May 18 2009	Brief amicus curiae of United States filed.
May 18 2009	Brief amici curiae of National Association of Counties, et al. filed.
May 18 2009	Brief amici curiae of Illinois, et al. filed.
Jun 17 2009	The time within which to file respondents' brief on the merits is further extended to and including July 31, 2009.
Jul 16 2009	SET FOR ARGUMENT ON Wednesday, October 14, 2009.
Jul 29 2009	Record received from U.S.C.A. for 7th Circuit. (1 envelope)
Jul 30 2009	CIRCULATED.
Jul 30 2009	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Jul 31 2009	Brief of respondents Chermane Smith, et al. filed. (Distributed)
Aug 4 2009	Brief amici curiae of Cato Institute, et al. filed. (Distributed)

Aug 4 2009	Record received from USDC ND Il. (1 envelope)
Aug 6 2009	Brief amicus curiae of National Police Accountability Project filed. (Distributed)
Aug 7 2009	Brief amicus curiae of Women's Criminal Defense Bar Association filed. (Distributed)
Aug 7 2009	Brief amicus curiae of Institute for Justice filed. (Distributed)
Aug 7 2009	Brief amici curiae of American Civil Liberties Union, et al. filed. (Distributed)
Aug 7 2009	Brief amicus curiae of Legal Aid Society filed. (Distributed)
Aug 31 2009	Reply of petitioner Anita Alvarez, Cook County, Illinois filed. (Distributed)
Sep 4 2009	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Oct 2 2009	Letter from Clerk of Court advising that counsel should be prepared to discuss at oral argument whether respondents have had forfeiture hearings or have otherwise had their property returned, and, if they have, the potential significance of those facts with respect to questions of mootness.
Oct 14 2009	Argued. For petitioner: Paul Castiglione, Assistant State's Attorney, Chicago, Ill.; and William M. Jay, Assistant to the Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus curiae.) For respondents: Thomas Peters, Chicago, Ill.

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PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED
08-351 SEP 15 2008
OFFICE OF THE CLERK

No. 08-

IN THE

Supreme Court of the United States

RICHARD A. DEVINE,
State's Attorney of Cook County, Illinois,

Petitioner,

v.

CHERMANE SMITH, EDMANUEL PEREZ, TYHESHA BRUNSTON, MICHELLE WALDO, KIRK YUNKER and TONY WILLIAMS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. In determining whether the Due Process Clause requires a State or local government to provide a post-seizure probable cause hearing prior to a statutory judicial forfeiture proceeding and, if so, when such a hearing must take place, should district courts apply the "speedy trial" test employed in *United States v. $8,850*, 461 U.S. 555 (1983) and *Barker v. Wingo*, 407 U.S. 514 (1972) or the three-part due process analysis set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976)?

2. In light of this Court's holding in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992), may a court of appeals order a district court to enter permanent injunctive relief enjoining the application of a State statute based simply upon Plaintiffs' allegations in a complaint, where the parties are not at issue as no answer was filed in the district court and no evidence was ever heard in that court?

LIST OF PARTIES

The parties to the proceeding below were defendant/petitioner Richard A. Devine, in his official capacity as State's Attorney of Cook County, Illinois, defendants City of Chicago, Philip J. Cline, Superintendent of Police and plaintiffs/respondents Chermane Smith, Edmanuel Perez, Tyhesha Brunston, Michelle Waldo, Kirk Yunker and Tony Williams ("Plaintiffs").

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Petitioner Richard A. Devine, State's Attorney of Cook County ("Petitioner" or "State's Attorney Devine") respectfully petitions for a writ of certiorari to review the opinion and decision of the United States Court of Appeals for the Seventh Circuit filed on May 2, 2008.

OPINIONS BELOW

The United States Court of Appeals for the Seventh Circuit reversed the decision of the United States District Court for the Northern District of Illinois granting Petitioner's motion to dismiss. The Seventh Circuit's opinion is reported at 524 F.3d 834 (7th Cir. 2008) and is reprinted in the Appendix hereto at 1a. The Seventh Circuit's order denying the petition for rehearing is unpublished and is reprinted in the Appendix hereto at 13a The district court's order granting Petitioner's motion to dismiss is unpublished and is reprinted in the Appendix hereto at 12a.

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Seventh Circuit from which petitioners seek review was issued on May 2, 2008. (App. 1a.) On May 16, 2008, Petitioner filed a petition for rehearing pursuant to Federal Rule of Appellate Procedure 40. On June 16, 2008, the United States Court of Appeals for the Seventh Circuit denied State's Attorney Devine's petition for rehearing. (App. 13a.)

This petition was timely filed within 90 days of the issuance of the June 16, 2008 order denying State's Attorney Devine's petition for rehearing. On July 3,

2008, the United States Court of Appeals for the Seventh Circuit granted Petitioner's motion to recall the case and stay the issuance of the mandate pending the filing of the subject petition in this Court.

The jurisdiction of this Court to review the decision of the Court of Appeals is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

42 U.S.C. § 1983

> § 1983. Civil action for deprivation of rights
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

725 ILCS 150/5 (2008)

Notice to State's Attorney. The law enforcement agency seizing property for forfeiture under the Illinois Controlled Substances Act [720 ILCS 570/100 *et seq.*], the Cannabis Control Act [720 ILCS 550/1 *et seq.*], or the Methamphetamine Control and Community Protection Act [720 ILCS 646/1 *et seq.*] shall, within 52 days of seizure, notify the State's Attorney for the county in which an act or omission giving rise to the forfeiture occurred or in which the property was seized of the seizure of the property and the facts and circumstances giving rise to the seizure and shall provide the State's Attorney with the inventory of the property and its estimated value. When the property seized for forfeiture is a vehicle, the law enforcement agency seizing the property shall immediately notify the Secretary of State that forfeiture proceedings are pending regarding such vehicle.

725 ILCS 150/6 (2008)

Non-Judicial Forfeiture. If non-real property that exceeds $ 20,000 in value excluding the value of any conveyance, or if real property is seized under the provisions of the Illinois Controlled Substances Act [720 ILCS 570/100 *et seq.*], the Cannabis Control Act [720 ILCS 550/1 *et seq.*], or the Methamphetamine Control and Community Protection Act [720 ILCS 646/1 *et seq.*], the State's Attorney shall institute judicial *in rem* forfeiture

proceedings as described in Section 9 of this Act [725 ILCS 150/9] within 45 days from receipt of notice of seizure from the seizing agency under Section 5 of this Act [725 ILCS 150/5]. However, if non-real property that does not exceed $ 20,000 in value excluding the value of any conveyance is seized, the following procedure shall be used:

(A) If, after review of the facts surrounding the seizure, the State's Attorney is of the opinion that the seized property is subject to forfeiture, then within 45 days of the receipt of notice of seizure from the seizing agency, the State's Attorney shall cause notice of pending forfeiture to be given to the owner of the property and all known interest holders of the property in accordance with Section 4 of this Act [725 ILCS 150/4].

(B) The notice of pending forfeiture must include a description of the property, the estimated value of the property, the date and place of seizure, the conduct giving rise to forfeiture or the violation of law alleged, and a summary of procedures and procedural rights applicable to the forfeiture action.

(C)(1) Any person claiming an interest in property which is the subject of notice under subsection (A) of Section 6 of this Act [725 ILCS 150/6] may, within 45 days after the effective date of notice as described in Section 4 of this Act [725 ILCS 150/4], file a verified

claim with the State's Attorney expressing his or her interest in the property. The claim must set forth:

(i) the caption of the proceedings as set forth on the notice of pending forfeiture and the name of the claimant;

(ii) the address at which the claimant will accept mail;

(iii) the nature and extent of the claimant's interest in the property;

(iv) the date, identity of the transferor, and circumstances of the claimant's acquisition of the interest in the property;

(v) the name and address of all other persons known to have an interest in the property;

(vi) the specific provision of law relied on in asserting the property is not subject to forfeiture;

(vii) all essential facts supporting each assertion; and

(viii) the relief sought.

(2) If a claimant files the claim and deposits with the State's Attorney a cost bond, in the form of a cashier's check payable to the clerk

of the court, in the sum of 10 percent of the reasonable value of the property as alleged by the State's Attorney or the sum of $ 100, whichever is greater, upon condition that, in the case of forfeiture, the claimant must pay all costs and expenses of forfeiture proceedings, then the State's Attorney shall institute judicial *in rem* forfeiture proceedings and deposit the cost bond with the clerk of the court as described in Section 9 of this Act [725 ILCS 150/9] within 45 days after receipt of the claim and cost bond. In lieu of a cost bond, a person claiming interest in the seized property may file, under penalty of perjury, an indigency affidavit.

(3) If none of the seized property is forfeited in the judicial *in rem* proceeding, the clerk of the court shall return to the claimant, unless the court orders otherwise, 90% of the sum which has been deposited and shall retain as costs 10% of the money deposited. If any of the seized property is forfeited under the judicial forfeiture proceeding, the clerk of the court shall transfer 90% of the sum which has been deposited to the State's Attorney prosecuting the civil forfeiture to be applied to the costs of prosecution and the clerk shall retain as costs 10% of the sum deposited.

(D) If no claim is filed or bond given within the 45 day period as described in subsection (C) of Section 6 of this Act [725 ILCS 150/6], the State's Attorney shall declare the

property forfeited and shall promptly notify the owner and all known interest holders of the property and the Director of the Illinois Department of State Police of the declaration of forfeiture and the Director shall dispose of the property in accordance with law.

725 ILCS 150/9 (2008)

Judicial *in rem* procedures. If property seized under the provisions of the Illinois Controlled Substances Act [720 ILCS 570/100 et seq.], the Cannabis Control Act [720 ILCS 550/1 et seq.], or the Methamphetamine Control and Community Protection Act [720 ILCS 646/1 *et seq.*] is non-real property that exceeds $ 20,000 in value excluding the value of any conveyance, or is real property, or a claimant has filed a claim and a cost bond under subsection (C) of Section 6 of this Act [725 ILCS 150/6], the following judicial *in rem* procedures shall apply:

(A) If, after a review of the facts surrounding the seizure, the State's Attorney is of the opinion that the seized property is subject to forfeiture, then within 45 days of the receipt of notice of seizure by the seizing agency or the filing of the claim and cost bond, whichever is later, the State's Attorney shall institute judicial forfeiture proceedings by filing a verified complaint for forfeiture and, if the claimant has filed a claim and cost bond, by depositing the cost bond with the clerk of the

court. When authorized by law, a forfeiture must be ordered by a court on an action *in rem* brought by a State's Attorney under a verified complaint for forfeiture.

(B) During the probable cause portion of the judicial *in rem* proceeding wherein the State presents its case-in-chief, the court must receive and consider, among other things, all relevant hearsay evidence and information. The laws of evidence relating to civil actions shall apply to all other portions of the judicial *in rem* proceeding.

(C) Only an owner of or interest holder in the property may file an answer asserting a claim against the property in the action *in rem*. For purposes of this Section, the owner or interest holder shall be referred to as claimant.

(D) The answer must be signed by the owner or interest holder under penalty of perjury and must set forth:

(i) the caption of the proceedings as set forth on the notice of pending forfeiture and the name of the claimant;

(ii) the address at which the claimant will accept mail;

(iii) the nature and extent of the claimant's interest in the property;

(iv) the date, identity of transferor, and circumstances of the claimant's acquisition of the interest in the property;

(v) the name and address of all other persons known to have an interest in the property;

(vi) the specific provisions of Section 8 of this Act [725 ILCS 150/8] relied on in asserting it is not subject to forfeiture;

(vii) all essential facts supporting each assertion; and

(viii) the precise relief sought.

(E) The answer must be filed with the court within 45 days after service of the civil *in rem* complaint.

(F) The hearing must be held within 60 days after filing of the answer unless continued for good cause.

(G) The State shall show the existence of probable cause for forfeiture of the property. If the State shows probable cause, the claimant has the burden of showing by a preponderance of the evidence that the claimant's interest in the property is not subject to forfeiture.

(H) If the State does not show existence of probable cause or a claimant has established by a preponderance of evidence that the claimant has an interest that is exempt under Section 8 of this Act [725 ILCS 150/8], the court shall order the interest in the property returned or conveyed to the claimant and shall order all other property forfeited to the State. If the State does show existence of probable cause and the claimant does not establish by a preponderance of evidence that the claimant has an interest that is exempt under Section 8 of this Act [725 ILCS 150/8], the court shall order all property forfeited to the State.

(I) A defendant convicted in any criminal proceeding is precluded from later denying the essential allegations of the criminal offense of which the defendant was convicted in any proceeding under this Act regardless of the pendency of an appeal from that conviction. However, evidence of the pendency of an appeal is admissible.

(J) An acquittal or dismissal in a criminal proceeding shall not preclude civil proceedings under this Act; however, for good cause shown, on a motion by the State's Attorney, the court may stay civil forfeiture proceedings during the criminal trial for a related criminal indictment or information alleging a violation of the Illinois Controlled Substances Act [720 ILCS 570/100 *et seq.*], the Cannabis Control Act [720 ILCS 550/1 *et seq.*], or the Methamphetamine Control and Community Protection Act [720 ILCS 646/1

et seq.]. Such a stay shall not be available pending an appeal. Property subject to forfeiture under the Illinois Controlled Substances Act [720 ILCS 570/100 *et seq.*], the Cannabis Control Act [720 ILCS 550/1 et seq.], or the Methamphetamine Control and Community Protection Act [720 ILCS 646/1 et seq.] shall not be subject to return or release by a court exercising jurisdiction over a criminal case involving the seizure of such property unless such return or release is consented to by the State's Attorney.

(K) All property declared forfeited under this Act vests in this State on the commission of the conduct giving rise to forfeiture together with the proceeds of the property after that time. Any such property or proceeds subsequently transferred to any person remain subject to forfeiture and thereafter shall be ordered forfeited unless the transferee claims and establishes in a hearing under the provisions of this Act that the transferee's interest is exempt under Section 8 of this Act [725 ILCS 150/8].

(L) A civil action under this Act must be commenced within 5 years after the last conduct giving rise to forfeiture became known or should have become known or 5 years after the forfeitable property is discovered, whichever is later, excluding any time during which either the property or claimant is out of the State or in confinement or during which criminal proceedings relating to the same conduct are in progress.

STATEMENT OF THE CASE

I. Background

Illinois' Drug Asset Forfeiture Procedure Act ("DAFPA" or the "Act") directs police departments to notify their jurisdiction's State's Attorney's Office within 52 days of the seizure of any property pursuant to the Illinois Controlled Substances Act, 720 ILCS 570/100 (2008), or the Cannabis Control Act, 720 ILCS 550/1 (2008). *See generally* 725 ILCS 150/5 (2008).

Upon receiving notice from a police department, the State's Attorney's Office (the "SAO") has 45 days to elect whether to initiate civil forfeiture proceedings. *See* 725 ILCS 150/6(A) (2008). If a forfeiture action is initiated, the SAO must provide notice to the owner of the property and all known interest holders before the 45 days elapse. *Id.* Pursuant to the Act, owners of personal property not exceeding $20,000 in value who wish to contest forfeiture (like Plaintiffs in this case) may file a verified claim and post a cost bond. Such action triggers a judicial proceeding in which the State must establish probable cause for forfeiture of the property. *See* 725 ILCS 150/6(C) (2008); 725 ILCS 150/9 (2008). Unless continued for good cause, this hearing must be convened within 60 days after the property owner files an answer to the complaint. 725 ILCS 150/9(G) (2008). One form of "good cause" that the Act recognizes is the pendency of related criminal charges. 725 ILCS 150/9(J) (2008).

In a significant number of cases, the SAO denies forfeiture requests and directs the return of property to the owner. If, however, the forfeiture request is approved, and the case involves either a vehicle of any value or non-real property worth $20,000 or less, the SAO sends formal notice of the pending forfeiture to the owner of the property and all known interest holders. As required by statute (725 ILCS 150/6), the notice includes a description of the property, the estimated value of the property, the date and place of seizure, the conduct giving rise to forfeiture or the violation of law alleged, and a summary of procedures and procedural rights applicable to the forfeiture action. In addition, the SAO sends a letter advising the owner and other interest holders that Assistant State's Attorneys are available to discuss the matter. Such meetings frequently occur, and as a result, the SAO either settles or rescinds the majority of the administrative forfeiture cases. If the action is rescinded, the property is returned to the owner.

While the Act does not expressly provide for a post-seizure/pre-forfeiture hearing, the manner in which the Act is applied by the Chicago Police Department (the "CPD") and the SAO shows that the owners of seized property are repeatedly given timely notice of the seizure and numerous opportunities to demonstrate that the property should be released. This is the case in both non-judicial forfeiture proceedings for personal property whose value does not exceed $20,000.00 that the SAO administratively conducts and judicial *in rem* forfeiture proceedings for property whose value exceeds $20,000.00.

Here, Plaintiffs filed a complaint alleging that their respective due process rights were violated because DAFPA did not mandate an immediate post-seizure probable cause hearing prior to the statutory judicial forfeiture proceeding. In this regard, Plaintiffs' class action complaint asked the district court to declare that DAFPA was unconstitutional as applied to Plaintiffs.

II. Proceedings Below

On November 22, 2006, Plaintiffs filed a class action complaint against State's Attorney Devine and defendants City of Chicago and Philip J. Cline, Superintendent of Police (the "City Defendants") (collectively "Defendants") alleging a violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution and 42 U.S.C. Section 1983 ("Section 1983"). The jurisdiction of the district court was invoked under 28 U.S.C. §§ 1331 and 1343.

On February 16, 2007, the City Defendants filed a motion to dismiss Plaintiffs' Class Action Complaint. On February 20, 2007, State's Attorney Devine also filed a motion to dismiss this complaint. In these motions to dismiss, Defendants argued that Plaintiffs' proposed class action complaint should be dismissed based upon the Seventh Circuit's decision in *Jones v. Takaki*, 38 F.3d 321 (7th Cir. 1994).

In *Jones*, the Seventh Circuit held that under *United States v. $8,850*, 461 U.S. 555, 564 (1983), district courts should apply the speedy trial test from *Barker v. Wingo*, 407 U.S. 514 (1972), to determine whether the

delay in the initiation of a civil forfeiture proceeding violated due process. *Jones*, 38 F.3d at 324. The *Jones* plaintiffs argued that *$8,850* was distinguishable because it focused "on whether the length of delay in initiation of the actual forfeiture proceeding violates the requirements of due process." *Id.* In contrast, the *Jones* plaintiffs contended that due process required a preliminary determination of probable cause because the forfeiture proceeding would not occur for some time. *Id. Jones* concluded that under this Court's decision in *United States v. Von Neumann*, 474 U.S. 242 (1986), this argument was legally untenable. *Id.*

Jones cited *Von Neumann* for the proposition that the Constitution does not require any interim procedure prior to the actual forfeiture proceeding. *Jones*, 38 F.3d at 324 *citing Von Neumann*, 474 U.S. at 249. In *Von Neumann*, this Court found that the Due Process Clause did not give the respondent a right to a prompt hearing on his petition for remission of his seized automobile pursuant to 19 U.S.C. § 1618 prior to the adjudication of the government's civil forfeiture complaint:

> We understand respondent to argue that his property interest in his car gives him a constitutional right to a speedy disposition of his remission petition without awaiting a forfeiture proceeding. We disagree. Implicit in this Court's discussion of timeliness in *$ 8,850* was the view that the forfeiture proceeding, without more, provides the postseizure hearing required by due process to protect Von Neumann's property interest in his car.

Von Neumann, 474 U.S. at 249.

Jones followed *Von Neumann* and concluded:

> despite plaintiffs' attempt to otherwise characterize their grievance, the only possible basis for their claim is that the delay in initiation of the forfeiture proceeding itself was unconstitutionally lengthy, as that is the only hearing to which they are constitutionally entitled. *$ 8,850* therefore provides the only vehicle through which they might have been able to state a viable claim.

Jones, 38 F.3d at 324. *Jones* held that under *$8,850* and *Von Neumann*, the appropriate test for determining whether the delay in initiating a civil forfeiture proceeding violates the Due Process Clause is the four part speedy trial test from *Barker v. Wingo*.

On February 21, 2007, Plaintiffs filed a response to defendants' motions to dismiss, acknowledging that *Jones* was controlling precedent that defeated Plaintiffs' claim that the factors from *Mathews v. Eldridge*, 424 U.S. 319 (1976) provided the proper analytical framework for determining whether the failure to provide an interim probable cause hearing post seizure but pre statutory forfeiture hearing violated the Due Process Clause. Plaintiffs conceded that "*Jones* is the governing precedent in this District and that *Jones* cannot be distinguished in any meaningful way from Plaintiffs' case." Plaintiffs argued that *Jones* conflicted with "*United States v. James Daniel Good Realty*, 510 U.S. 43 (1993) and *Krimstock v. Kelly*, 464 F.3d 246 (2nd Cir. 2006)" but "recognize[d] that the Court is currently

bound by *Jones*." On February 22, 2007, the district court granted Defendants' motions to dismiss, specifically referring to Plaintiffs' counsel's admission that the court was bound by *Jones*. (App. 12a.)

On May 2, 2008, the Court of Appeals for the Seventh Circuit issued an opinion reversing the decision of the district court. *Smith v. City of Chicago*, 524 F.3d 834 (7th Cir. 2008); (App. 1a).[1] In *Smith*, the Seventh Circuit rejected its previous analysis from *Jones* and declined to follow *$8,850* and *Von Neumann*. In so doing, *Smith* and the case upon which it did rely, *Krimstock v. Kelly*, 306 F.3d 40 (2nd Cir. 2002), have created a split with other circuits that have applied the *$8,850/Barker* test when determining whether a delay in initiating a civil forfeiture proceeding violates the Due Process Clause.

In marked contrast to *Jones*, *Smith* distinguished *$8,850* and *Von Neumann* on the grounds that the federal statute in *Von Neumann* allowed for the filing of a petition for remission while DAFDA did not provide property owners with a procedure for seeking their property prior to the statutory civil forfeiture hearing. *Jones* recognized the folly of this line of argument, noting that in *Von Neumann*, this Court recognized that under *$8,850*, "the forfeiture proceeding, without more, provides the postseizure hearing required by due process." *Von Neumann*, 474 U.S. at 249. While *Jones* followed *$8,850* and *Von Neumann*, *Smith* and *Krimstock* cannot be reconciled with these cases.

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1. The Seventh Circuit noted that *Smith* "signal[ed] a reversal of course from *Jones*" and, thus, the *Smith* opinion was circulated to the full court before release in accordance with Seventh Circuit Rule 40(e). *Smith*, 524 F.3d at 839; (App. 11a.).

Smith overruled *Jones* and remanded the instant case to the district court with instructions to enter injunctive relief against Defendants, even though the parties are at the pleading stage and Defendants have not yet answered Plaintiffs' class action complaint. The Seventh Circuit stated that "[t]he district court, with the help of the parties, should fashion appropriate procedural relief consistent with this opinion." *Smith*, 524 F.3d at 839; (App. 10a.).

SUMMARY OF THE ARGUMENT

From its inception as a nation, the United States has had authority "to seek parallel *in rem* civil forfeiture actions and criminal prosecutions based upon the same underlying events." *United States v. Ursery*, 518 U.S. 267, 274 (1991). State governments have the same authority. *See, e.g.*, 725 ILCS 150/9 (2008).

In civil forfeiture cases, courts frequently consider what process is due to the owner of the seized property. In *$8,850*, for example, this Court declared that the most "apt analogy" to the process due the claimant was a criminal defendant's right to a speedy trial, which is analyzed with *Barker's* four-step balancing test. *$8,850*, 461 U.S. at 564. In *Von Neumann*, this Court further held that the Due Process Clause does not require any procedure prior to the actual forfeiture proceeding. *Von Neumann*, 474 U.S. at 249. When read together, *$8,850* and *Von Neumann* illustrate three basic principles — (1) the Due Process Clause does not require an interim post-seizure but pre-forfeiture hearing, (2) in determining whether a delay in initiating a civil forfeiture hearing violates due process, courts should

apply the four-part "speedy trial" test from *Barker v. Wingo* and (3) whether or not the claimant has a statutory right to seek remission of the seized property prior to the civil forfeiture hearing is irrelevant to the application of the *$8,850/Barker* analysis. *Smith* and *Krimstock v. Kelly*, 306 F.3d 40 (2nd Cir. 2002), the Second Circuit case upon which *Smith* relies, both employ a due process analysis to delays in initiating civil forfeiture proceedings that cannot be squared with *$8,850* and *Von Neumann*.

In addition to conflicting with *$8,850* and *Von Neumann*, *Smith* and *Krimstock* also create a conflict among the circuits.[2] This case has significant national importance because it will clarify the proper legal standard for determining whether a delay in initiating a civil forfeiture proceeding violates due process.

REASONS FOR GRANTING THE PETITION

Smith applied the *Mathews v. Eldridge* factors to determine whether DAFPA violated the Due Process Clause and concluded that the statute was unconstitutional. In this regard, the Seventh Circuit stated "given the length of time which can result

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2. Other circuits have applied the *$8,850/Barker* speedy trial factors when analyzing claims that a delay in initiating a civil forfeiture proceeding violated due process. *See, e.g., United States v. Turner*, 933 F.2d 240 (4th Cir. 1991); *United States v. Robinson*, 434 F.3d 357 (5th Cir. 2005); *United States v. Ninety-Three Firearms*, 330 F.3d 414 (6th Cir. 2003); *United States v. $18,505.10*, 739 F.2d 354 (8th Cir. 1984); *United States v. $47,980 in Canadian Currency*, 804 F.2d 1085 (9th Cir. 1986); and *Nnadi v. Richter*, 976 F.2d 682 (11th Cir. 1992).

between the seizure of property and the opportunity for an owner to contest the seizure under the DAFPA, some sort of mechanism to test the validity of the retention of the property is required." *Smith*, 524 F.3d at 838; (App. 10a.). This holding is expressly contrary to *$8,850* and *Von Neumann*.

Under *Von Neumann*, the constitutionality of a delay in initiating a civil forfeiture proceeding did not turn on the existence of a probable cause hearing (or some other mechanism, as contemplated in *Smith*) post-seizure but pre-forfeiture hearing. Instead, the due process analysis — like the analysis in *$8,850* — turns on the application of the *Barker* speedy trial factors. As this Court recognized in *$8,850*:

> The flexible approach of *Barker*, which "necessarily compels courts to approach speedy trial cases on an *ad hoc* basis," 407 U.S., at 530, is thus an appropriate inquiry for determining whether the flexible requirements of due process have been met. As we stressed in *Barker*, none of these factors is a necessary or sufficient condition for finding unreasonable delay. Rather, these elements are guides in balancing the interests of the claimant and the Government to assess whether the basic due process requirement of fairness has been satisfied in a particular case.

$8,850, 461 U.S. at 564-565 *citing Barker*, 407 U.S. at 530. *Mathews v. Eldridge* was decided seven years before *$8,850*. If it wished to do so, this Court could have

adopted the *Mathews v. Eldridge* due process factors in *$8,850*. It did not. Instead, the Court applied the flexible due process approach from *Barker*. Without any authority from this Court, the Seventh Circuit abandoned of the *$8,850/Barker* due process analysis. This ruling is contrary to both *$8,850* and *Von Neumann*. Moreover, in their abandonment of the *$8,850/Barker* due process analysis, *Smith* and *Krimstock v. Kelly* create a conflict with decisions from the Fourth, Fifth, Sixth, Eighth, Ninth and Eleventh Circuits.

The Seventh Circuit also pronounced that:

> The district court, with the help of the parties, should fashion appropriate procedural relief consistent with this opinion. The hearing should be prompt but need not be formal. We leave it to the district court to determine the notice requirement and what a claimant must do to activate the process. We do not envision lengthy evidentiary battles which would duplicate the final forfeiture hearing. The point is to protect the rights of both an innocent owner and anyone else who has been deprived of property and, in the case of an automobile or personal property other than cash, to see whether a bond or an order can be fashioned to allow the legitimate use of the property while the forfeiture proceeding is pending.

Smith, 524 F.3d at 838-839; (App. 10a.). In making this pronouncement, the Seventh Circuit ignored the procedural posture of this litigation. Defendants have

never answered Plaintiffs' complaint and Plaintiffs have offered no evidence to survive summary judgment or to succeed at trial. In directing the district court to fashion relief, the Seventh Circuit's ruling is contrary to this Court's holding in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992) that a plaintiff's burden escalates at each successive stage of civil litigation. The current state of the record does not support the Seventh Circuit's instruction to enter permanent injunctive relief consistent with its opinion in *Smith*.

In accordance with the criteria set forth in Supreme Court Rule 10(a) and 10(c), this Court should grant this petition.

I. This Court Should Resolve The Significant Conflict In The Circuits Regarding The Issue Of Whether *$8,850/Barker* Or *Mathews v. Eldridge* Provides The Proper Analytical Framework For Determining Whether A Delay In Initiating A Civil Forfeiture Proceeding Violates The Due Process Clause.

The Seventh Circuit's efforts to distinguish the instant lawsuit from *$8,850* and *Von Neumann* rest on the most crimson of red herrings – the fact that DAFPA does not provide for an interim probable cause hearing that occurs post-seizure but pre-forfeiture hearing. *Von Neumann* disposes of this argument and shows that the existence or non-existence of such an interim hearing is irrelevant.

The plaintiffs in *Jones* rested their due process argument on the fact that DAFPA did not provide for

an interim probable cause hearing. *Jones* outlined this argument and explained that it was untenable under *$8,850* and *Von Neumann*:

> [Plaintiffs argue] that their case poses a question distinct from that addressed in *$ 8,850* and therefore requires analysis under a different framework. Whereas *$ 8,850* focuses on whether the length of delay in initiation of the actual forfeiture proceeding violates the requirements of due process, they reason, their case asks whether, in light of the fact that the forfeiture proceeding will not occur for some time, they are entitled to a preliminary determination of probable cause.
>
> We need look no further than the Supreme Court's decision in *United States v. Von Neumann*, 474 U.S. 242 (1986), to dispose of this argument. In that case, the plaintiff complained that a 36-day delay by customs officials in acting on a petition for remission of a seized automobile deprived him of due process. The Court rejected Von Neumann's argument, after reviewing the *$ 8,850/Barker* factors. *See id.* at 250-51. The Court's reliance on those factors puts to rest the plaintiffs' suggestion in this case that *$ 8,850* applies only to delay in initiation of the forfeiture proceeding itself and does not extend to other types of hearing. As plaintiffs do here, Von Neumann argued that due process entitled him to an additional, preliminary hearing, and

> the Court found that *$ 8,850* provided the appropriate vehicle for assessing his claim.

Jones, 38 F.3d at 324.

In determining whether application of a forfeiture statute to a particular defendant violates due process, the proper inquiry under this Court's jurisprudence is not whether a forfeiture statute provides for an interim hearing. Instead, courts should focus on the delay in initiation of a civil forfeiture proceeding and apply the *$8,850/Barker* test to determine whether such a delay violates due process. *Jones* was faithful to this analytical approach. *Smith* and *Krimstock* are not.

A. *$8,850* And *Von Neumann* Establish The Analytical Framework For Determining Whether A Civil Forfeiture Statute Violates The Due Process Clause.

In *$8,850*, this Court considered whether an 18-month delay in the filing of a civil forfeiture proceeding, following the seizure of United States currency by Customs officers, violated the claimant's due process right to a meaningful hearing at a meaningful time. *$8,850*, 461 U.S. at 562. This Court declared that the most "apt analogy" to the process due the claimant was a criminal defendant's right to a speedy trial, which is analyzed with *Barker's* four-step balancing test. *Id.* at 564. *Barker*, this Court reasoned, "provides an appropriate framework for determining whether the delay . . . violated the due process right to be heard at a meaningful time." *Id.*

The *Barker* test requires consideration of the following four factors: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of his right and (4) the prejudice to the defendant. *Id.* No one factor by itself necessarily points to an undue delay; rather, the factors are "guides in balancing the interests of the claimant and the Government to assess whether the basic due process requirement of fairness has been satisfied in a particular case." *Id.* at 565. Because due process is a "flexible" concept, *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972), this Court stressed that the *Barker* analysis cannot be applied generally, but must be conducted "on an *ad hoc* basis." *$8,850*, 461 U.S. at 564.

The rationale for utilizing the *Barker* test was a simple one: the concerns of undue delay, both pretrial and pre-forfeiture, are analogous. The *$8,850/Barker* analysis was not an aberration and this Court has not abandoned the analysis. The *Barker* analysis provided the rationale for the Court's *Von Neumann* opinion, and has been faithfully followed by federal circuit courts for over twenty years. *See United States v. Von Neumann*, 474 U.S. 242 (1986). It is *Krimstock* and now *Smith* that have created a split among the circuits.

In *Von Neumann*, the plaintiff claimed his due process rights were violated by customs officials' 36-day delay in ruling on his petition for remission of an automobile seized at the border between the United States and Canada. *Von Neumann*, 474 U.S. at 245-47. The plaintiff further argued that due process required "a speedy disposition of his remission petition without

awaiting a forfeiture proceeding." *Id.* at 249. This Court unambiguously disagreed, stating:

> Implicit in this Court's discussion of timeliness in *$8,850* was the view that the forfeiture proceeding, without more, provides the postseizure hearing required by due process to protect Von Neumann's property interest in the car.

Id. This Court concluded that remission proceedings are "not *necessary* to a forfeiture determination, and therefore are not constitutionally required." *Id.* (emphasis in original); *see also Willis v. United States*, 787 F.2d 1089, 1094 (7th Cir. 1986)(Drug Enforcement Agency's remissions proceedings are a "matter of grace" not attended by due process requirements).

The Seventh Circuit's opinion that due process requires a "prompt post-deprivation hearing" is no different than Von Neumann's due process argument regarding the "speedy disposition of his remission petition." *See Von Neumann*, 474 U.S. at 249. However, this Court specifically rejected that argument.

In *Smith*, the Seventh Circuit acknowledged "[a]ll in all, we agree with *Krimstock*. The private interest involved, particularly in the seizure of an automobile, is great." *Smith*, 524 F.3d at 838; (App. 8a.). *Smith* may agree with *Krimstock* but neither case can be squared with *$8,850* and *Von Neumann*.

B. *Smith* Cannot Be Harmonized With Controlling Precedent, *$8,850* And *Von Neumann*.

Smith rejected the *$8,850/Barker* speedy trial factors and instead relied on the due process analysis from *Mathews v. Eldridge*, 424 U.S. 319 (1976). *Smith*, 524 F.3d at 836, 837. Relying on *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993), *Smith* applied the *Mathews* factors to determine whether the delay in initiating a civil forfeiture proceeding for a seized automobile violates due process. The *Mathews* factors are the "private interest affected by the official action; the risk of an erroneous deprivation of that interest through the procedures used, as well as the probable value of additional safeguards; and the Government's interest, including the administrative burden that additional procedural requirements would impose." *Smith*, 524 F.3d at 837 *citing Good*, 510 U.S. at 53; (App. 5a-6a.). The *Mathews* factors, unlike the *Barker* speedy trial factors, do not focus the inquiry on the delay in initiating the proceeding, the defendant's assertion of his right and prejudice to the defendant. Moreover, and cardinally, *Mathews* does not support the Seventh Circuit's rejection of the due process framework articulated in *$8,850*.

Smith, however, notes that *Mathews* has been applied in various different contexts and, thus, could be applied to a due process claim based upon the delay of initiating a civil forfeiture proceeding. *See Smith*, 524 F.3d at 837, n. 2; (App. 6a.). This position suffers from a fatal flaw — although *Mathews* was decided seven years before *$8,850*, this Court chose not to utilize the

Mathews analysis in reaching its decision in *$8,850*. Rather, the Court specifically applied the *Barker* speedy trial test. *Smith* simply ignored the fact that *$8,850* applied a due process analysis distinct from the one employed in *Mathews*.[3]

Smith attempted to distinguish *$8,850* and *Von Neumann* but its analysis rings hollow. *Smith* stated:

> The *Krimstock* court properly, we think, distinguished *Von Neumann* and *$8,850*. *$8,850* concerns the speed with which the civil forfeiture proceeding itself is begun—a different question from whether there should be some mechanism to promptly test the validity of the seizure. At first glance, *Von Neumann* seems on point, but there are significant differences between that case and ours. *Von Neumann* involved proceedings for remission or mitigation under U.S. customs laws, not forfeiture under state law.

Smith, 524 F.3d at 837; (App. 7a.). The reasoning in *Smith* is simply contrary to *$8,850* and *Von Neumann*. *Smith* may hold that "the speed with which the civil forfeiture proceeding itself is begun [is] a different question from whether there should be some mechanism

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3. In any event, *Mathews* has never been a "one-size-fits-all" solution to due process analysis. *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 66 (1993) (Rehnquist, C.J., dissenting). As this Court stated in *Dusenberry v. United States*, 534 U.S. 161, 168 (2002), "we have never viewed *Mathews* as announcing an all-embracing test for deciding due process claims."

to promptly test the validity of the seizure" but *Von Neumann* held otherwise. Indeed, *Von Neumann* held that the existence or non-existence of this alternative mechanism is simply irrelevant to the due process analysis. *Von Neumann*, 474 U.S. at 249. The only relevant inquiry is whether the delay in initiating the civil forfeiture proceeding violated due process. *Id.* Consequently, the fact that *Von Neumann* involved proceedings for remission or mitigation under federal customs laws and not forfeiture under state law is wholly irrelevant to the question of whether the *Barker* speedy trial factors or the *Mathews* factors should be applied in a due process claim regarding a delay in a civil forfeiture proceeding for a seized automobile.

In part, *Smith* relied upon the importance of the automobile in modern society as a basis for its decision to overrule *Jones* and to decline to apply the due process analysis from *$8,850* and *Von Neumann*. *Smith*, 524 F.3d at 838; (App. 8a.). In so doing, *Smith* once again disregarded *Von Neumann*. Like this case, *Von Neumann* involved a party alleging that the failure to have a prompt hearing subsequent to the seizure of his automobile but before the civil forfeiture hearing violated due process.

In *Von Neumann*, the Ninth Circuit "noted that the propriety of the length of the delay may turn on the nature of the item that has been seized, and reemphasized the point made in its earlier opinion that 'special hardships [are] imposed on persons deprived of the use of their automobiles . . . '." *Von Neumann*, 474 U.S. at 248 *citing Von Neumann v. United States*, 729 F.2d 657, 661 (9th Cir. 1984). This Court rejected this

position and held that Von Neumann's property interest in the automobile did not give him a constitutional right to a speedy disposition of his remission petition. Instead, this Court applied the *$8,850/Barker* factors and held that the delay in responding to the remission petition did not violate due process.

Smith did not distinguish *$8,850* or *Von Neumann* and, in the end, did little more than ignore these decisions. *Smith* primarily relied on *Krimstock v. Kelly*, 306 F.3d 40 (2nd Cir. 2002), a case which, in turn, relied on *Good*. *Good* does not support the decision of the Second and Seventh Circuits to deviate from *$8,850* and *Von Neumann*.

It is significant to note that *Good* did not reject *$8,850*. To the contrary, *Good* carefully identified the narrow issue before the Court in the following manner:

> [t]he governmental interest we consider here is not some general interest in forfeiting property but the specific interest in seizing real property before the forfeiture hearing. The question in the civil forfeiture context is whether *ex parte* seizure is justified by a pressing need for prompt action.

Good, 510 U.S. at 56. *Good*, therefore, addressed a different question than *$8,850* (*i.e.*, the seizure of real property as opposed to personal property) and ultimately found "no pressing need," *id.* at 56, ruling that due process requires advance notice and a hearing before the government may seize real property. *Id.* at 46.

Good reasoned that a citizen's right to possession of his real property is of far greater import than one's right to personal property. This Court labeled Good's interest in his property, "a private interest of historic and continuing importance." *Id.* at 53-54. This Court reinforced the point, stating:

> [t]he seizure of a home produces a far greater deprivation than the loss of furniture, or even attachment. It gives the government a right to prohibit sale, but also the right to evict occupants, to modify the property, to condition occupancy, to receive rents, and to supercede the owner in all rights pertaining to the use, possession, and enjoyment of the property.

Id. at 54. In addition, real property (unlike personal property) cannot move or be hidden from reach in an effort to frustrate the government's interest. *Id.* at 52 *comparing Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 679 (1974) (seizure of yacht without pre-deprivation notice and hearing did not violate due process because seizure permitted *in rem* jurisdiction over the vessel, pre-seizure notice would allow for its concealment or destruction, and the seizure was not initiated by self-interested parties). Consequently, the Court ruled that absent a showing of exigent circumstances, the Due Process Clause requires notice and a meaningful opportunity to be heard prior to the seizure of real property subject to civil forfeiture. *Good*, 510 U.S. at 62.

In reaching its conclusion in *Good*, this Court used the *Mathews* due process analysis but did so only after citing *$8,850* and explaining that there exist "extraordinary situations" in which a valid government interest justifies an exception to the ordinary requirement of notice and a pre-deprivation hearing. *Id.* at 53. *Mathews*, the Court stated, "provides guidance" as to whether "the seizure of real property for purposes of civil forfeiture justifies such an exception." *Id.*

Pursuant to the *Mathews* analysis utilized in *Good*, the Due Process Clause mandates notice and a pre-deprivation hearing when the government seeks to seize real property with an eye toward civil forfeiture. *Id.* at 62. However, *$8,850*, *Jones* and the instant lawsuit all address requests for a prompt hearing *after* governmental seizure of *personal* property. Because *Good* addressed neither post-deprivation hearings nor the seizure of personal property, *Good* did not contravene this Court's earlier decision in *$8,850*. *Good* is inapposite and does not support the decisions in either *Smith* or *Krimstock*.

Like *Smith*, *Krimstock* misread *Good* and ignored *$8,850*. *Krimstock* concerned a challenge to a New York City ordinance allowing for the seizure of motor vehicles suspected of being instrumentalities of misdemeanor offenses such as driving while intoxicated. *Krimstock*, 306 F.3d at 44. The relevant ordinance provided for a post-seizure civil forfeiture proceeding that, in practice, routinely occurred "months or even years after the seizure." *Id.* at 45. After the district court granted the defendant's motion to dismiss the complaint, the Second

Circuit reexamined the issue in detail. *Id.* The Second Circuit characterized both *$8,850* and *Von Neumann* as "customs" cases, *Krimstock*, 306 F.3d at 52 and n. 12, and stated, "a speedy trial and a prompt retention hearing are not parallel in this context." *Id.* at 53.

The Second Circuit repeatedly relied upon *Good*, and inexplicably claimed that *Good* mandates the *Mathews* analysis "to evaluate the adequacy of process offered in post-seizure, pre-judgment deprivations of property in civil forfeiture proceedings." *Id.* at 60. *Good*, however, simply does not speak to post-seizure situations but instead dealt exclusively with whether a *pre-*deprivation hearing was necessary before seizure of *real* property. *Good*, 510 U.S. at 62. Unlike *Good*, *$8,850* considered whether the delay in initiating forfeiture proceedings for personal property violated the Due Process Clause.

The Second Circuit, however, failed to recognize that *$8,850* and *Von Neumann* (and not *Good*) provided the proper analytical framework for considering a due process challenge to a statute or ordinance that provides for a post-seizure forfeiture proceeding. Like *Smith*, *Krimstock* is a flawed decision built upon faulty underpinnings. In rejecting the application of the *$8,850/Barker* speedy trial factors in favor of the *Mathews* due process factors, *Smith* and *Krimstock* have created a split among the circuits.

C. *Smith* And *Krimstock* Create A Split Among The Circuits.

Other than *Smith* and *Krimstock*, federal circuits have readily embraced *$8,850* as the seminal case defining how due process claims based on the delay in the initiation of judicial forfeiture proceedings would be analyzed.

In *United States v. Turner*, 933 F.2d 240 (4th Cir. 1991), for example, the United States brought an action for the civil forfeiture of a 1963 Chevrolet Corvette. The defendant claimed that the 16-month delay between the seizure of the automobile and the government's filing of a civil forfeiture action constituted an unreasonable delay that violated his right to due process. In assessing this due process claim, the Fourth Circuit applied the *$8,850/Barker* speedy trial factors and concluded that the delay did not violate due process. *Turner*, 933 F.2d at 246.

In *United States v. Robinson*, 434 F.3d 357 (5th Cir. 2005), the defendant argued that a seven month delay between the government's seizure of cash and the government's issuance of notice of the civil forfeiture proceeding violated due process. The Fifth Circuit noted that just as there is no obvious bright line dictating when a post-seizure hearing must occur, "there is no obvious bright line as to when the government must first notify a party of its intent to forfeit seized funds." *Robinson*, 434 F.3d at 364 *citing $8,850*, 461 U.S. at 562. The Fifth Circuit applied the *$8,850/Barker* speedy trial factors to determine whether the government's delay in providing notice of a civil forfeiture proceeding violated due process.

In *United States v. Ninety-Three Firearms*, 330 F.3d 414 (6th Cir. 2003), the United States filed a civil *in rem* forfeiture action, under 18 U.S.C. § 924(d), for the forfeiture of ninety-three firearms involved in a violation of 18 U.S.C. § 922(g)(1), five years after the seizure of the firearms. The owner of the seized property argued that the government's delay in bringing the judicial forfeiture action violated his right to due process. The Sixth Circuit applied the *$8,850/Barker* speedy trial factors to determine whether this delay violated due process.

In *United States v. $18,505.10*, 739 F.2d 354 (8th Cir. 1984), the owners of the seized property argued that the delay of the government in instituting a forfeiture action against cash and several items of personal property violated the Due Process Clause. Likewise, in *United States v. $47,980 in Canadian Currency*, 804 F.2d 1085 (9th Cir. 1986), the owner of Canadian currency argued that a 14 month delay in the institution of a forfeiture proceeding against the currency violated the Due Process Clause. In resolving these due process claims, both the Eighth and Ninth Circuits applied the *$8,850/Barker* speedy trial factors.

In *Nnadi v. Richter*, 976 F.2d 682 (11th Cir. 1992), the Eleventh Circuit heard an appeal of the district court's order compelling the Customs Service to return the claimant's car, seized pursuant to 19 U.S.C. § 1595 as property used to aid the introduction of illegal drugs into the United States. In considering whether the delay in initiating a civil forfeiture proceeding for the car violated due process, the Eleventh Circuit applied the *$8,850/Barker* speedy trial factors.

The majority of circuits follow *$8,850* and *Von Neumann*. *Smith* and *Krimstock* have created a split between the Second and Seventh Circuits and the Fourth, Fifth, Sixth, Eighth, Ninth and Eleventh Circuits. This Court should grant this petition in order to resolve the conflict among the circuits that *Smith* has created.

II. Contrary To *Lujan*, The Seventh Circuit Directed The District Court To Enter Injunctive Relief Even Though No Answer Has Been Filed And No Proof Adduced.

Plaintiffs have alleged that DAFPA is unconstitutional as applied in each of their cases. Indeed, paragraphs 7 and 8 of Plaintiffs' complaint allege that the City, acting in conjunction with the State's Attorney, did not provide Plaintiffs with "a prompt post-seizure hearing to determine probable cause" and "continue to detain their property" in violation of the Due Process Clause. (Complaint, ¶¶ 7-8) Such claims are, by definition, individualized, as each individual plaintiff presents a completely different factual case.

For example, plaintiff Chermane Smith claims that her vehicle was seized on or about January 19, 2006 (Complaint, ¶ 25), while plaintiff Kirk Yunker claims his cash was confiscated on September 26, 2006 (Complaint, ¶ 29) — a difference of over eight months. Plaintiffs Smith, Edmanuel Perez, Tyhesha Brunston, and Michelle Waldo all claim that forfeiture actions have been filed and are pending against them (Complaint, ¶¶ 25-28) but plaintiffs Yunker and Tony Williams assert that no such action has been filed. (Complaint, ¶¶ 29-30). Some of the named plaintiffs contend they were never

charged with a criminal offense (Smith, Perez, Brunston, Waldo), while others state that they were (Yunker and Williams). (Complaint, ¶¶ 25-30). None of these claims have advanced beyond the pleading stage, as the district court granted Defendants' motions to dismiss. Nonetheless, on the non-existent record in this matter, the Seventh Circuit directed "[t]he district court, with the help of the parties, [to] fashion appropriate procedural relief consistent with this opinion." *Smith*, 524 F.3d at 838; (App. 10a.).

This Court has recognized:

> At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we "presume that general allegations embrace those specific facts that are necessary to support the claim." (citation omitted) In response to a summary judgment motion, however, the plaintiff can no longer rest on such "mere allegations," but must "set forth" by affidavit or other evidence "specific facts," Fed. Rule Civ. Proc. 56(e), which for purposes of the summary judgment motion will be taken to be true. And at the final stage, those facts (if controverted) must be "supported adequately by the evidence adduced at trial." (citation omitted).

Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992). The portion of *Smith* directing the district court to enter injunctive relief based upon a record that consists of nothing more than Plaintiffs' allegations is not consistent with the above principles articulated in *Lujan*.

Defendants filed 12(b)(6) motions to dismiss this as applied constitutional challenge based upon *Jones v. Takaki*, 38 F.3d 321 (7th Cir. 1994). On February 22, 2007, the district court granted these 12(b)(6) motions to dismiss stating, "[a]s plaintiffs' counsel admits, this court is bound by the decision in *Jones v. Takaki*, 38 F.3d 321 (7th Cir. 1994)." (App. 12a.).

Because of this procedural posture, this case does not currently have any kind of factual record, much less a fully developed one. The imposition of injunctive relief below at this stage of the litigation surely should not stand.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DECIDED MAY 2, 2008

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 07-1599

CHERMANE SMITH, EDMANUEL PEREZ, TYHESHA BRUNSTON, MICHELLE WALDO, KIRK YUNKER, and TONY WILLIAMS,

Plaintiffs-Appellants,

v.

CITY OF CHICAGO, PHILIP CLINE, Superintendent, Chicago Police Department, and RICHARD A. DEVINE, Cook County State's Attorney,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 06 C 6423—**Elaine E. Bucklo**, *Judge.*

ARGUED JANUARY 11, 2008—DECIDED MAY 2, 2008

Before BAUER, POSNER, and EVANS, *Circuit Judges.*

Appendix A

EVANS, Circuit Judge. The Chicago Police Department, acting under the Illinois Drug Asset Forfeiture Procedure Act (DAFPA), 725 ILCS 150/1 *et seq.* (2004), seized property belonging to the plaintiffs. In response, the plaintiffs filed this case, under 42 U.S.C. § 1983, claiming that when property is seized under the Act, due process requires that they be given a prompt, postseizure, probable cause hearing, even though the DAFPA does not require any such hearing.

In the district court, the plaintiffs conceded, based on our decision in *Jones v. Takaki*, 38 F.3d 321 (7th Cir.1994), that their complaint should be dismissed. It was. And they are now here asking us to reexamine *Jones* in light of *United States v. James Daniel Good Real Property*, 510 U.S. 43, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993), and *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), two cases that predate *Jones* but were not cited in that opinion.[1]

DAFPA permits the seizure of vehicles, aircraft, and vessels along with money involved in certain drug crimes. The property may be seized by a law enforcement officer without a warrant where there is probable cause to believe it was involved in a drug crime and is, accordingly, subject to forfeiture. When property is seized, forfeiture proceedings must be instituted. As relevant here, the law enforcement agency that seizes the property—in

1. Interestingly, Attorney Thomas Peters of Chicago argued this case before us in January, as well as *Jones*, before a different panel, almost 14 years ago.

this case, the Chicago police department—must, within 52 days, notify the state's attorney of the seizure and the circumstances giving rise to the seizure. Once the state's attorney receives notice of the seizure, she must do one of two things, depending on the value of the property seized. If it is worth more than $20,000, she must file judicial in rem forfeiture proceedings within 45 days. If the nonreal property is worth less than $20,000, she must notify the owner, within 45 days, regarding a possible forfeiture. The owner then has 45 days in which to file a verified claim to the property with the state's attorney. If a claim is filed and bond is posted, the state's attorney must file judicial-in-rem forfeiture proceedings within 45 days. Thus, under this statutory scheme, for property worth more than $20,000, 97 days can elapse between the seizure of the property and the filing of judicial forfeiture proceedings. For property worth less than $20,000, it could be a maximum of 187 days-though we note that the claimant, by acting swiftly to file a claim, can reduce that time to 142 days. The claim here, as it was in *Jones*, is that because so much time can elapse before forfeiture proceedings are started, it violates due process not to have a postseizure/preforfeiture hearing of some type.

We seemed to reject the claim in *Jones*. But our present reexamination of the issue convinces us that the answer is not so clear. In *Jones*, our focus was on the issue of class certification. We determined that under *United States v. $8,850*, 461 U.S. 555, 103 S.Ct. 2005, 76 L.Ed.2d 143 (1983), and *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972), the plaintiffs' claims

were not typical of the claims of the class, and class certification was improper. Because the plaintiffs had conceded that, if we used the *Barker* analysis, summary judgment was properly granted to the defendants, we gave only slight consideration to the merits of the claim and affirmed the judgment for the city. Here, once again, the plaintiffs argue that *Good* and *Krimstock v. Kelly*, 306 F.3d 40 (2nd Cir.2002), establish that the proper due process analysis for their claim is set out in *Mathews*, rather than in *Barker*. Their argument is persuasive and prompts us to take another run at the issue.

It has long been understood that forfeiture of personal property, which is easily capable of being moved or concealed, involves different concerns from the forfeiture of real property and does not require a preseizure hearing. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 94 S.Ct. 2080, 40 L.Ed.2d 452 (1974). A postseizure hearing is, however, required. The question is the timing of that hearing. In *$8,850*, 461 U.S. at 562-63, 103 S.Ct. 2005, the Court framed the issue as "when a postseizure delay may become so prolonged that the dispossessed property owner has been deprived of a meaningful hearing at a meaningful time." The Court determined in that circumstance the appropriate analysis was that in *Barker*, a case involving a defendant's right to a speedy trial, once proceedings have begun against him:

> The *Barker* balancing inquiry provides an appropriate framework for determining whether the delay here violated the due process right to be heard at a meaningful time.

At 564, 103 S.Ct. 2005. The *Barker* test requires consideration of the length of the delay, the reason for the delay, the defendant's assertion of his right, and the prejudice to the defendant. A few years later, relying on *$8,850,* the Court used the *Barker* test to evaluate administrative proceedings following the seizure by custom agents of a new Jaguar Panther automobile that was not properly declared at the Canadian border (it was purchased in Switzerland, shipped to Vancouver, and stopped at a U.S. border checkpoint in Blaine, Washington). *United States v. Von Neumann,* 474 U.S. 242, 106 S.Ct. 610, 88 L.Ed.2d 587 (1986).

As we shall see, there are significant reasons to doubt whether these cases should be controlling in the situation before us. To explain why, we start with *Good,* even though that decision involves real, not personal property. Drugs and drug paraphernalia were found in defendant Good's Hawaii home. The federal government sought civil forfeiture of the house and the land on the basis that the property had been used in connection with a drug offense. One issue before the Court was whether in the absence of exigent circumstances, the Due Process Clause prohibits the seizure of real property without a prior adversarial hearing. The answer was that a preseizure hearing is required. The Court looked to the *Mathews* factors: the "private interest affected by the official action; the risk of an erroneous deprivation of that interest through the procedures used, as well as the probable value of additional safeguards; and the

Government's interest, including the administrative burden that additional procedural requirements would impose." 510 U.S. at 53, 114 S.Ct. 492.[2]

Relying in part on *Good*, the Court of Appeals for the Second Circuit in *Krimstock* applied the *Mathews* factors to the seizure of automobiles under New York City's Administrative Code, concluding that a prompt postseizure retention hearing, with adequate notice, is required for motor vehicle seizures. In other words, after the seizure and before the actual forfeiture proceeding, a hearing must be held to test whether the vehicle can be held. As a basis for its conclusion, the court cited a number of salient factors, including the possibility that there may be an innocent owner of the seized automobile. The importance of an automobile as a mode of transportation and, for some people, a means to earn a living was another important factor in assessing the private interest. Others were the availability of hardship

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2. *Mathews* itself, of course, involved the termination of Social Security disability benefit payments, but the use of its analysis is pervasive. It has been used in everything from the analysis of prison transfers (*Wilkinson v. Austin*, 545 U.S. 209, 125 S.Ct. 2384, 162 L.Ed.2d 174 (2005)), to the evaluation of police department procedures for verifying that the right person was in custody (*Hernandez v. Sheahan*, 455 F.3d 772 (7th Cir.2006)), to a company's claim that its rights were violated by a delay in notice that it might be liable to a worker under the Black Lung Benefits Act (*Roberts & Schaefer Co. v. Director, Office of Workers' Compensation Programs*, 400 F.3d 992 (7th Cir.2005)). We even mentioned *Mathews*-though we did not need to reach the issue-in a case involving the seizure of a dog (*Wall v. City of Brookfield*, 406 F.3d 458 (7th Cir.2005)).

relief and the length of the deprivation. In addition, even if an individual ultimately prevails, an automobile continues to depreciate during the time it is retained. In contrast, the court found that the governmental interest could be adequately protected by a bond or a restraining order to prevent the sale or destruction of the automobile. In short,

> [P]romptly after their vehicles are seized . . . as alleged instrumentalities of crime, plaintiffs must be given an opportunity to test the probable validity of the City's deprivation of the vehicles *pendente lite*, including probable cause for the initial warrantless seizure.

The *Krimstock* court properly, we think, distinguished *Von Neumann* and *$8,850*. *$8,850* concerns the speed with which the civil forfeiture proceeding itself is begun—a different question from whether there should be some mechanism to promptly test the validity of the seizure. At first glance, *Von Neumann* seems on point, but there are significant differences between that case and ours. *Von Neumann* involved proceedings for remission or mitigation under U.S. customs laws, not forfeiture under state law. More importantly, the customs laws allowed procedures for Von Neumann to obtain a speedy release of his automobile prior to the actual forfeiture hearing. For one thing, he could file a motion under Federal Rule of Criminal Procedure 41(e) for the return of his vehicle. He had, in effect, relief similar to that which the plaintiffs in this case seek. In fact, Von Neumann's vehicle was

released in 2 weeks after he posted bond. Furthermore, the entire delay about which the parties were in dispute was a mere 36 days. In significant ways, the case bears little resemblance to *Krimstock* or to our case.

The one thing that becomes clear is that, like many other due process issues, the answer as to whether a prompt hearing is required grows out of the situation. Our reconsideration of the issue leads us to find that the procedures set out in DAFPA show insufficient concern for the due process right of the plaintiffs.

All in all, we agree with *Krimstock*. The private interest involved, particularly in the seizure of an automobile, is great. Our society is, for good or not, highly dependent on the automobile. The hardship posed by the loss of one's means of transportation, even in a city like Chicago, with a well-developed mass transportation system, is hard to calculate. It can result in missed doctor's appointments, missed school, and perhaps most significant of all, loss of employment. This is bad enough for an owner of an automobile, who is herself accused of a crime giving rise to the seizure. But consider the owner of an automobile which is seized because the driver—not the owner-is the one accused and whose actions cause the seizure. The innocent owner can be without his car for months or years without a means to contest the seizure or even to post a bond to obtain its release. It is hard to see any reason why an automobile, not needed as evidence, should not be released with a bond or an order forbidding its disposal. The person from whom cash is seized also has a strong

interest in a hearing, though obviously the posting of a cash bond for cash is an absurdity.

On the other hand, we recognize the City's interest in being certain that a vehicle is not destroyed before a court can issue a judgment in the forfeiture proceedings. We also understand that the preforfeiture hearing would impose some administrative burden on the City. However, due process always imposes some burden on a governing entity. We are not contemplating protracted proceedings, but rather notice to the owner of the property and a chance, perhaps rather informal, to show that the property should be released.

As an aside, we note that some states have procedures which provide an early opportunity to challenge the retention of seized property. The *Krimstock* court cited a Florida statute, which provides that seizing agencies must make a diligent effort to notify the owner. Notice must be mailed within 5 working days after the seizure and must state that an adversarial preliminary hearing may be requested within 15 days of receipt of the notice. The hearing must be held within 10 days after the request is received. Fla. Stat. 932.703(2)(a). Arizona provides for an order to show cause hearing if an application is filed by an owner or interest holder in the property. The owner must file the application within 15 days of notice of the seizure. A.R.S. s. 13-4310. Although not providing for a preforfeiture hearing, even the ordinance in *Krimstock* provided for more expeditious handling of forfeiture proceedings than does the DAFPA.

In short, our fresh look at this issue causes us to conclude that given the length of time which can result between the seizure of property and the opportunity for an owner to contest the seizure under the DAFPA, some sort of mechanism to test the validity of the retention of the property is required. The judgment dismissing the complaint, therefore, must be reversed. The district court, with the help of the parties, should fashion appropriate procedural relief consistent with this opinion. The hearing should be prompt but need not be formal. We leave it to the district court to determine the notice requirement and what a claimant must do to activate the process. We do not envision lengthy evidentiary battles which would duplicate the final forfeiture hearing. The point is to protect the rights of both an innocent owner and anyone else who has been deprived of property and, in the case of an automobile or personal property other than cash, to see whether a bond or an order can be fashioned to allow the legitimate use of the property while the forfeiture proceeding is pending.

One other matter requires mention. The City of Chicago and the police superintendent argue that the complaint should be dismissed against them pursuant to *Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). We reject the argument at this time. Plaintiffs' complaint contains allegations which, if true, would survive *Monell*. They are that actions were taken in accordance with City policies and procedures.

Appendix A

Because our opinion signals a reversal of course from *Jones*, we have circulated it under Circuit Rule 40(e) to all judges of the court in regular active service (Judge Rovner, however, did not participate in this case) and no judge voted to rehear the matter en banc.

Accordingly, the judgment of the district court is REVERSED and the case is REMANDED for proceedings consistent with this opinion.

APPENDIX B — DOCKET ENTRY FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS DATED FEBRUARY 22, 2007

United States District Court,
Northern District of Illinois

Name of Assigned Judge or Magistrate Judge
Elaine E. Bucklo

CASE NUMBER
06 C 6423

DATE
2/22/2007

CASE TITLE
Smith, et al. Vs. City of Chicago, et al.

DOCKET ENTRY TEXT
Defendants' motions to dismiss complaint heard and the motions are granted. As plaintiffs' counsel admits, this court is bound by the decision in Jones Vs. Takaki, 38 F. 3rd 321 (7th Cir. 1994). Plaintiffs' motion for class certification is denied as moot.

Courtroom Deputy Initials:
MPJ

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED JUNE 16, 2008

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

June 16, 2008

Before

WILLIAM J. BAUER, *Circuit Judge*

RICHARD A. POSNER, *Circuit Judge*

TERENCE T. EVANS, *Circuit Judge*

No. 07-1599

CHERMANE SMITH, EDMANUEL PEREZ, TYHESHA BRUNSTON, et al.,

Plaintiffs-Appellants,

v.

CITY OF CHICAGO, PHILIP CLINE, Superintendent, Chicago Police Department, and RICHARD A. DEVINE, Cook County State's Attorney,

Defendants-Appellees.

Appendix C

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 06 C 6423

Elaine E. Bucklo, Judge.

ORDER

On May 16, 2008, the defendant-appellee Richard A. Devine filed a petition for rehearing. All the judges on the original panel have voted to deny a rehearing. The petition is therefore DENIED.

OPPOSITION BRIEF

117 (2)

No. 08-351

Supreme Court, U.S.
FILED
JAN 9 - 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

RICHARD A. DEVINE
State's Attorney of Cook County, Illinois,

Petitioner,

v.

CHERMANE SMITH, EDMANUEL PEREZ, TYHESHA BRUNSTON, MICHELLE WALDO, KIRK YUNKER, and TONY WILLIAMS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether local law enforcement agencies may seize personal property and then retain custody of the property indefinitely, without any judicial or administrative review of the lawfulness of the continued detention of the property?

2. Whether the circuit court imposed a premature "mandatory injunction" when the court remanded the case for additional discovery and directed the district court to fashion a remedy based on the facts that evolved from the discovery process?

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RULE

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STATEMENT OF THE CASE

The Illinois Drug Asset Forfeiture Procedure Act (DAFPA, 725 ILCS 150\1 *et seq.*) allows police departments 52 days following the seizure of property to decide whether to recommend forfeiture of the seized property. 725 ILCS 150\5. During those 52 days, it is the policy and practice of the City of Chicago (City) and Petitioner Devine to refuse to return the seized property. (R. App. 2, 3). Following the City's 52 allotted days, Petitioner Devine and the Cook County State's Attorney's Office (SAO) have an additional 45 days to review the forfeiture recommendation of the Chicago Police Department. 725 ILCS 150\6(A). During those 45 days, it is Devine's policy and practice to refuse to return the seized property upon demand by the owner. (R. App. 2, 3). As a result of this policy and practice, property seized by a Chicago police officer without a warrant may be held for forfeiture by the SAO for 97 days before a forfeiture decision is even made. *Id.*

When Devine decides to seek forfeiture, more delays are inevitable. Notice is mailed to the last known address of the property owner, who then has 45 days to file a written claim and pay a filing fee. 72 ILCS 150/6(c)(1) and 150/9(A). Until an Answer is filed and the fee paid, the property owner cannot have the merits of the case reviewed by a judicial officer. *Id.* When a claim is filed, the forfeiture trial may be continued for 60 days without explanation or cause. *Id.* And "for good cause shown" (725 ILCS 150/9(F)) or when there is a related proceeding in criminal court, the forfeiture trial may be stayed indefinitely. 725 ILCS 150/9(J). As a result of these built-in delays, property owners usually must wait

several months before they can appear in court and contest the continued detention of their property. (R. App. 3, 4).

Three of the Plaintiffs (Smith, Perez, and Brunston) had their cars seized by Chicago police officers acting without warrants but pursuant to the DAFPA. (R. App. 6, 7). None of these Plaintiffs were charged with a criminal offense. (R. App. 6, 7). Each of these Plaintiffs was forced to wait more than a year without a judicial hearing related to the continued detentions of their cars. (R. App. 6, 7). The other Plaintiffs (Yunker, Waldo, and Williams) had cashed seized. (R. App. 6, 7). Their money was held for months without judicial review of the legitimacy of the original seizure or of the continued detention of the money. (R. App. 6, 7).

Plaintiffs filed their Complaint pursuant to 42 U.S.C. § 1983. (R. App. 1). They included a request for class certification, and they sought an injunction that would require the City of Chicago and Devine to hold hearings promptly after the seizure of property. (R. App. 4, 5). These hearings would follow the seizure of the property but precede the actual forfeiture trial. (R. App. 4, 5). Plaintiffs did not seek dismissal of their state forfeiture cases or any other relief that would prevent the forfeiture cases from proceeding.

Before discovery commenced, all of the Defendants moved to dismiss based on *Jones v. Takaki*, 38 F.3d 321, 324, 325 (7th Cir. 1994), which had held that the only process that is due when property is seized for forfeiture is the forfeiture trial itself. Plaintiffs acknowledged that *Jones* was the then controlling precedent and the District Court dismissed the case. (P. App. 1, 3).

The Seventh Circuit overruled *Jones* and held that Plaintiffs were entitled to a hearing promptly after their property was seized. (P. App. 8-11). The case was then remanded to the District Court to "fashion appropriate procedural relief consistent with this opinion." (P. App. 10). Since *Smith* overruled *Jones*, the *Smith* panel circulated its opinion to all active members of the Seventh Circuit, except Judge Rovner, who did not participate. *Id.* None of the thirteen active members of the Seventh Circuit "voted to rehear the matter en banc." (P. App. 11).

SUMMARY OF THE ARGUMENT

Review by this Court is not warranted because the circuits are not split on the issues decided by the Seventh Circuit, and that court did not issue a premature, mandatory injunction.

Every circuit that has addressed the question has held that when a government agency seizes personal property without a warrant, a prompt post-seizure hearing is required. *See Krimstock v. Kelly*, 306 F.3d 40 (2nd Cir. 2002); *Propert v. District of Columbia*, 948 F.2d 1327, 1332-33 (D.C. Cir.1991); *Draper v. Coombs*, 792 F.2d 915, 923 (9th Cir. 1986); *Coleman v. Watt*, 40 F.3d 255,261 (8th Cir. 1994); *Breath v. Cronvich*, 729 F.2d 1006,1011 (5th Cir. 1984) ; *Goichman v. Rhueban Motors Inc.*, 682 F.2d 1320, 1323-24 (9th Cir. 1982); and *De Franks v. Mayor and City Council of Ocean City*, 777 F.2d 185 (4th Cir. 1985). In all of these cases, the courts applied the flexible due process methodology that is derived from this Court's decision in *Mathews v. Eldridge*, 419 U.S. 319 (1976). And this Court specifically applied *Mathews*

to forfeiture proceedings in *United States v. James Daniel Good Realty*, 510 U.S. 43 (1983).

In effect, Devine is urging the Court to overturn decades of established precedent applying *Mathews* to circumstances like those presented here. *See, e.g., Bell v. Burson*, 402 U.S. 535, 539, (1971); *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971); *Ingraham v. Wright*, 430 U.S. 651 (1977). Devine mistakenly insists the Court should jettison *Mathews* in favor of the very different criteria of *Barker v. Wingo*, 407 U.S. 514 (1972), even though *Barker* is used exclusively in cases where a party demands the extreme and disfavored remedy of dismissal of the charges. *Doggett v. United States*, 505 U.S. 647, 120 L. Ed. 2d 520 (1992); *United States v. Loud Hawk*, 474 U.S. 302, 88 L. Ed. 2d 640 (1986). *Barker* never is applied when the issue is whether an interim hearing - one that follows the seizure of property but precedes the trial on the merits - is required. *See, e.g., City of Los Angeles v. David*, 538 U.S. 715, 716 (2003); *Gilbert v. Homar*, 520 U.S. 924, 932 (1999) - (applying *Mathews* rather than *Barker).*

In fact, the constitutional harm that is inflicted by Devine does not occur in federal forfeiture proceedings because none of the routinely, available federal remedies is offered by Devine. When a federal agency seizes personal property, the owner has access to a panoply of prompt, post-seizure proceedings that more often than not result in return of the property or remission of some of the loss. Federal claimants can file an equitable action to compel the filing of the forfeiture or return of the seized property. *Slocum v. Mayberry*, 15 U.S. (2 Wheat) 1, 10 (1817). Rule 41(e) of the Federal Rules of Criminal

Procedure also allows property owners to file claims for the return of seized property and 19 U.S.C. § 1618, and 19 C.F.R. § 162.31(a) authorize remission and mitigation petitions. A 10% bond can be posted to secure the release of seized vehicles. 19 U.S.C. §§ 1608 and 1614.

In summary, the Seventh Circuit acted in accordance with this Court's teaching, when it applied *Mathews* and concluded that Devine cannot detain property for months without some form of interim, judicial review.

REASONS FOR DENYING THE PETITION

I. When The Police Seize Personal Property Without A Warrant, The Property Owner Is Entitled To A Prompt Post-Seizure Hearing.

A. The Circuits Are Not Split On This Issue.

Petitioner Devine's principal contention is that the Court should review this case to correct a split among the circuits. (Pet., at 19-22). No such split exists.

The Second Circuit has specifically addressed the question presented here on three occasions and each time held that a prompt, post-seizure hearing is required. *See Krimstock v. Kelly*, 306 F.3d 40 (2nd Cir. 2002); *Jones v. Kelly*, 378 F.3d 198 (2nd Cir. 2004); *Krimstock v. Kelly*, 464 F.3d 246 (2nd Cir. 2006). The forfeiture scheme at issue in the *Krimstock* cases was substantially the same as the Illinois Drug Asset Forfeiture Procedure Act (DAFPA, 725 ILCS150/5 *et seq.*) that is at issue here. Under the New York

forfeiture act, motor vehicles were seized from "those accused of driving while intoxicated" and in other circumstances "for which a motor vehicle could be considered an instrumentality" of the crime. *Krimstock*, 306 F. 3d at 43. After the seizure, the car remained in the city's possession "in the hope of one day . . . prevailing in civil forfeiture proceedings." *Id.* at 44. The civil forfeiture proceedings in *Krimstock*, like those at issue here, "generally [awaited] the resolution of criminal charges and [took] months or even years to be finalized." *Id.*

The Second Circuit applied *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) to those facts and held that vehicle owners are entitled to prompt, post-seizure hearings. *Krimstock*, 306 F. 3d at 43. In two subsequent cases, the Second Circuit re-affirmed its commitment to *Mathews* as the correct due process standard, whenever the issue is whether a property owner is entitled to a hearing that follows the seizure but precedes the forfeiture trial. *Jones*, 378 F.3d at 202-04; *Krimstock*, 464 F.3d at 252-54.

All of the other circuit courts also consistently hold that when the government seizes a vehicle, the owner of the vehicle is entitled to a hearing within days of the seizure. In *Coleman v. Watt*, 40 F.3d 255, 261 (8th Cir. 1994), for instance, the Eighth Circuit held that when a car is seized, a post-deprivation delay of more than seven days without a hearing violates due process. A similar result was reached by the Ninth Circuit in *Goichman v. Rhueban Motors Inc.*, 682 F.2d 1320, 1323-24 (9th Cir. 1982) and in *Stypman v. City and County of San Francisco*, 557 F.2d 1338, 1344 (9th Cir. 1977) - ("A five-day delay in justifying detention of a private vehicle is

too long. Days, even hours, of unnecessary delay may impose onerous burdens upon a person deprived of his vehicle"). The Fifth Circuit upheld slightly longer delays, but only because the car owner had the right to post bond and secure the release of the car pending trial. *Breath v. Cronvich*, 729 F.2d 1006, 1011 (5th Cir. 1984); *see also De Franks v. Mayor and City Council of Ocean City*, 777 F.2d 185 (4th Cir. 1985); *Propert v. District of Columbia*, 948 F.2d 1327, 1332-33 (D.C. Cir. 1991)

In all of these cases, the courts held that a prompt, post-deprivation hearing was required. Thus, the circuit courts are not split, and there is no reason for this Court to review Plaintiffs' case.

B. The Seventh Circuit Properly Applied The Mathews Due Process Criteria.

In the preceding Section, Plaintiffs proved that the circuits are not split with respect to the issue presented here. In this Section, Plaintiffs prove that *Mathews* is the time-tested, due process standard for cases involving the right to such hearings. Therefore, the Seventh Circuit was following this Court's lead and there is no reason for further review.

Plaintiffs acknowledge that pre-seizure hearings are not required when the police seize personal property for forfeiture. *Calero Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974). But when a pre-seizure hearing is not feasible, a prompt post-seizure hearing (one that follows the seizure but precedes the trial) must be held. *See, e.g., Connecticut v. Doehr*, 501 U.S. 1, 5-6 (1991); *Brock v. Roadway Exp., Inc.*, 481 U.S. 252, 261 (1987);

Federal Deposit Insurance Corp., v. Mallen, 486 U.S. 230 (1988). The *Mathews* criteria are applied to determine when the hearing must be held and to define the nature and scope of the hearing. *Memphis Light, Gas and Water v. Craft*, 436 U.S. 1, 18-20 (1978); *Heller v. Doe*, 509 U.S. 312, 330 (1993).

Mathews requires consideration of a) the personal interest affected by the prolonged detention; b) the risk of an erroneous deprivation; and c) the nature of the government's interest and the cost of holding an interim hearing. *Mathews*, 424 U.S. at 335. Using this methodology, this Court has consistently held that the government must offer some form of post-seizure hearing promptly after personal property is seized. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430-31(1982).

In *North Georgia Finishing v. Di-Chem*, 419 U.S. 601, 606, 42 L. Ed. 2d 751 (1975), for example, the Court struck down a statute that permitted impoundment of property and postponed all review until the trial on the merits. The Georgia statute violated due process because, "[A] bank account . . . . was impounded and, absent a bond, put totally beyond use during the pendency of the litigation on the alleged debt . . . . without notice or opportunity for an early hearing and without participation by a judicial officer." The same due process analysis was applied in *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 339, 23 L. Ed. 2d 349 (1969), *Barry v. Barachi*, 433 U.S. 55, 64-65, 61 L. Ed. 2d 365 (1979), and *Zinermon v. Burch*, 494 U.S. 113, 128, 108 L. Ed. 2d 100 (1990). The lesson of these due process cases is that when a pre-deprivation hearing is not feasible, a prompt post-seizure hearing is required.

With these well-established principles in mind, the Seventh Circuit relied on *Mathews* and held that property owners have a due process right to a prompt, post-seizure hearing. Because the District Court did not consider the *Mathews* criteria, the Seventh Circuit remanded the case to the District Court to determine what relief *Mathews* might require. In that respect, the Seventh Circuit acted in accordance with all of the other circuits and applied the *Mathews* due process methodology that this Court has routinely applied under similar circumstances.

C. Mathews Applies To Forfeiture Proceedings.

Devine, nonetheless, maintains that *Mathews* never applies to forfeiture proceedings involving personal property. (Pet. at 27-29). That contention is unquestionably wrong.

In *United States v. James Daniel Good Realty*, 510 U.S. 43 (1993), the Court applied *Mathews* to the seizure of real property and held that owners of real property are entitled to a pre-seizure hearing, even when the police already have a warrant to seize the property. *Good*, 510 U.S. at 51-53. The Government maintained that since it had complied with the Fourth Amendment's Warrant Clause, its conduct was beyond reproach. The Court rejected that argument because no case supported "the proposition that the Fourth Amendment is the beginning and the end of the constitutional inquiry whenever a seizure occurs." *Good*, 510 U.S. at 51. Instead, the Court examined the seizure under the Due Process Clause, applied traditional *Mathews* due process review, and held that, since real property has a permanent location, a pre-seizure hearing is necessary. *Id.*

Plaintiffs acknowledge that, when it comes to personal property, *Mathews* does not require a pre-seizure hearing. *Calero Toledo v. Pearson Yacht Leasing*, 416 U.S. 663 (1974). The police must be allowed latitude to seize personal property without prior notice and without a pre-seizure hearing. *Id.* A rule that mandated pre-seizure hearings for personal property would be unworkable; property owners would use the advance notice to hide or dispose of the personal property. But once personal property is in police custody, the due process analysis is the same as it is for real property. By then, "the reasons that justify dispensing with the magistrate's neutral judgment evaporate." *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975). At that point, "the State's reasons for taking summary action (decrease) . . . (while the) need for a neutral determination of probable cause increases significantly." *Id.*

In light of *Good*, Devine cannot deny that *Mathews* is applied to forfeiture proceedings so he is forced to maintain that *Good* only applies to real property. According to Devine, real property deserves significantly greater protection than personal property and, therefore, *Good* must be limited to real property. But the difference between real and personal property can be accounted for by *Mathews* without dumping *Mathews* for *Barker v. Wingo*, 407 U.S. 514 (1972), as Devine claims the Court must do. (Pet., at 27, 28). Devine offers no reason for this Court to suddenly change course and overrule decades of cases applying *Mathews*'s pragmatic and flexible approach to issues like the one presented here.

Furthermore, taken to its logical conclusion, Devine's approach would require pre-arrest notice even when a judge had already issued an arrest warrant. *But see Michigan v. DeFillippo*, 443 U.S. 31, 36, 61 L. Ed. 2d 343 (1979); *Atwater v. Lago Vista*, 532 U.S. 318, 354, 149 L. Ed. 2d 549 (2001) - (holding that the police may arrest and detain a suspect without a warrant and without pre-seizure notice to the suspect). The loss of personal liberty that follows an arrest deserves more protection than the property owner in *Good* received because personal liberty is valued more than an interest in real property. *See Foucha v. Louisiana*, 504 U.S. 71, 80, 118 L. Ed. 2d 437 (1992); *Addington v. Texas*, 441 U.S. 418, 424, 433, 60 L. Ed. 2d 323(1979); *In re Winship*, 397 U.S. 358, 364, 25 L. Ed. 2d 368 (1970). That being the case, a due process rule that requires notice and a pre-seizure hearing to protect an interest in real property must also require a warrant and a pre-arrest hearing before a liberty interest is extinguished. But that result is contrary to all of this Court's cases dealing with arrests without warrants, so Devine's understanding of *Good*, as limited to real property, is unquestionably wrong. *See, e.g., Illinois v. Gates*, 462 U.S. 213, 235 (1983); *Ornelas v. United States*, 517 U.S. 690, 700 (1996) - (allowing for arrest based on a police officer's assessment of probable cause without a warrant or a pre-arrest hearing).

The police are allowed to arrest without a warrant, without prior notice, and without a pre-arrest hearing. *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975). In *Good* the police had a warrant from a judge establishing "probable cause to believe the property was subject to forfeiture . . . . " *Good*, 510 U.S. at 47. The warrant alone would

justify an arrest and an extended detention of a person (*County of Riverside v. McLaughlin*, 500 U.S. 44, 57 (1991), yet no one ever seriously argues for pre-arrest notice. "Due process permits an arrest without a previous warrant because it is dangerous to allow a person . . . to roam at large while awaiting a hearing." *Holly v. Woolfolk*, 415 F.3d 678, 681 (7th Cir. 2005). Devine's contention, therefore, cannot be right. *See United States v. Watson*, 423 U.S. 411, 416-24, 46 L. Ed. 2d 598 (1976); *Illinois v. McArthur*, 531 U.S. 326, 148 L. Ed. 2d 838 (2001) - (allowing for arrests without a warrant, without pre-arrest notice, and without a pre-arrest hearing).

The reason underlying *Good's* pre-seizure notice requirement is not that real property deserves greater protection than personal liberty deserves. Pre-seizure notice is feasible and therefore required with respect to real property because real property has a permanent and fixed location. Pre-arrest notice is not feasible because many suspects would use the advance notice as an opportunity to flee, a concern that obviously does not apply to a house or a lot. But once the suspect is in police custody he, too, is in a fixed location and no longer is a flight risk, so a prompt, post-seizure hearing must be held. *McLaughlin*, 500 U.S. at 57. For the same reasons, Plaintiffs never suggested they were entitled to a pre-seizure hearing. Personal property can be moved, hidden or sold given sufficient advance notice of an impending seizure. However, once personal property is seized and is in police custody, a post-seizure hearing is both feasible and necessary. And that is all the Seventh Circuit held in Plaintiffs' case. (P. App. 8-11).

D. The Right To Dismissal Of A Forfeiture Action Is Not The Same As The Right To A Prompt Interim Hearing.

Devine, however, cites a series of federal forfeiture cases where the claimant sought dismissal of the forfeiture action rather than an interim hearing. Devine then maintains that those cases prove that the *Barker* speedy trial factors should have been applied to Plaintiffs' due process claim. (Pet., at 22- 26). But the cases cited by Devine involved a very different issue of law and starkly different facts.

Devine insists that *United States v. Eight Thousand Eight Hundred and Fifty Dollars ($8,850)*, 461 U.S. 555 (1983) and *United States v. Von Neumann*, 474 U.S. 242 (1986) prove that *Barker* rather than *Mathews* is the applicable due process standard. From that false premise, Devine mistakenly concludes that he may seize personal property and hold it for months without offering some form of prompt, post-seizure judicial review.

Devine's premise is false and his conclusion wrong because *$8,850* and *Von Neumann* presented a very different issue - whether the claimants were entitled to dismissal of forfeiture actions due to pretrial delays. If Plaintiffs were demanding dismissal of their pending state forfeiture charges, *Barker* would control the inquiry. The remedy at issue here, however, is the right to an interim hearing, not dismissal of the charges, so *Mathews* is the appropriate due process standard, just as it was in *Good*.

In *$8,850*, the claimant was indicted on customs and banking charges. The government also initiated a civil forfeiture action. *$8,850*, 461 U.S. at 556-57. Pursuant to applicable federal regulations, the claimant had the right to file a petition for remission or mitigation immediately following the seizure. *$8,850*, 461 U.S. at 557. At that time, remission petitions were filed in 90% of all such cases, and in 75 % of the cases the claimant was granted "at least partial relief." *Id.* at 558. Thus, the claimant in *$8,850* had an available and routinely successful interim remedy, but she wanted far more than a partial remission. She wanted all her money back. *Id.* at 558. The issue, therefore, was whether the delay in filing the judicial forfeiture complaint warranted the extreme remedy of dismissal, even though the claimant had access to interim remedies.

The claimant in *$8,850* admitted the seizure of her money was lawful and that there were grounds to forfeit her money. Her interest was not in a prompt, post-seizure hearing; she wanted the forfeiture case dismissed regardless of the merits of the seizure. *Id.* That being the case, *Barker* rather than *Mathews* applied. Since the delay in filing the forfeiture action was tempered by the availability of the remission procedure and other interim remedies (none of which are allowed by Devine), the claimant in *$8,850* fell far short of proving a *Barker* violation.

In *Von Neumann*, as in *$8,850*, the claimant insisted on outright dismissal of the forfeiture action based on an alleged delay in filing the judicial forfeiture action. The delay in *Von Neumann* was only 36 days and, as in *$8,850*, the claimant in *Von Neumann* was "able to

trigger the rapid filing of a forfeiture action if he desire[d] it." *Von Neumann*, 474 U.S. at 244 n.3. In fact, by posting a bond, the claimant secured the release of his car within two weeks and his remission petition was granted, in part, on the 36th day. He, however, was not satisfied with that interim relief and demanded dismissal of the forfeiture action.

The claimant in *Von Neumann* was not entitled to dismissal for the same reason the claimant in *$8,850* was not entitled to this "unsatisfactorily severe" remedy. In both cases, the claimants had access to prompt, interim remedies and those interim remedies provided substantial relief. *Von Neumann* and *$8,850*, therefore, are limited to cases where the claimant seeks dismissal of the forfeiture action, even though he has access to prompt, and largely successful, interim relief.

The lesson that emerges from *Mathews*, *$8,850* and *Von Neumann* is that the due process analysis changes depending on the nature of the relief sought. When the issue is whether an informal hearing should follow a government seizure but precede the trial on the merits, *Mathews* provides the relevant guideline. On the other hand, when a property owner has access to prompt, interim relief but demands dismissal of the forfeiture charges, the *Barker* speedy trial factors come into play.

Good illustrates perfectly the distinction between the type of due process claim raised by Plaintiffs - a request for an intermediate or interim hearing - as contrasted with the requests for dismissal of the forfeiture actions in *$8,850* and *Von Neumann*. The claimant in *Good* could not establish prejudice, an

essential element of any *Barker* inquiry, because he admitted he committed an act that warranted forfeiture of his property. *Good*, 510 U.S. at 46,47. He also had access to interim remedies and the delay in the forfeiture trial was related, at least in part, to his conduct. On those facts, the property owner in *Good* could not prevail under the *Barker* standard. So, if *Barker* were the due process standard, the claimant in *Good* would have lost. He, however, prevailed on his claim because the Court applied *Mathews*, just as the Court always has done when the issue was whether an interim hearing is required.

The distinction between these two remedies, dismissal of charges versus the right to an interim hearing, is analogous to the distinction between the right to a *Gerstein* hearing (*Gerstein v. Pugh*, 420 U.S. 103, 113, 114 (1975)) following an arrest, as opposed to the right to dismissal of the charges. Every person accused of a crime has the right to a *Gerstein* hearing within 48 hours of arrest (*County of Riverside v. McLaughlin*, 500 U.S. 44, 57 (1991)) but failure to provide the *Gerstein* hearing within that time frame does not entitle the arrestee to dismissal of the charges. *Powell v. Nevada*, 511 U.S. 79, 83 (1994). The interim review afforded by the *Gerstein* hearing exists independent of the right to a speedy trial, and the due process evaluation changes when a party is seeking an interim hearing as distinguished from dismissal of the charges.

The same distinction applies to the other cases cited by Devine. In *United States v. Robinson*, 434 F.3d 357 (5th Cir. 2005) "large sums of cash" were recovered from "a Crown Royal bag" that was found under the driver's

seat of a car the claimant was driving. *Robinson*, 434 F.3d at 359. Although the claimant was under investigation "as part of a multi-party drug" operation, he was not arrested when the money ($188,980.00) was seized. *Id.* An administrative forfeiture action was initiated and a certified letter was sent to the claimant. *Id.* The letter notified him of his right to file a claim as well as his right to interim relief through a remission petition. *Id.* Four more letters were sent in the following weeks and notice was published in New York Times. Meanwhile, the claimant was indicted and ultimately convicted of drug trafficking and money laundering. *Robinson*, 434 F.3d at 360.

The seized cash was administratively forfeited in June, 2000, yet the claimant did not file a motion for return of the property until three years later. *Id.* He was not concerned with interim relief and, in fact, extensive interim relief was available to him shortly after the money was seized. The claimant in *Robinson* had only one goal in mind; he wanted the forfeiture vacated on speedy trial grounds. *Robinson*, therefore, is factually and legally distinguishable from Plaintiffs' case, where the only requested relief is a prompt, interim hearing. When interim remedies are available, as they were in *Robinson*, and the property owner eschews them in favor of the more extreme remedy of dismissal of the forfeiture action, the *Barker* speedy trial analysis applies. But when the owner does not have access to an interim remedy and he is not seeking dismissal of the forfeiture action, *Mathews* applies.

In *United States v. Ninety-Three (93) Firearms*, 330 F.3d 414 (9th Cir. 2003), an administrative forfeiture action was filed within 120 days of the seizure, but the government waited five years to file a judicial forfeiture action. *Ninety-Three Firearms*, 330 F.3d at 417, 419. The owner filed a motion to dismiss based on the delay in filing the judicial forfeiture action. *Id.* The Ninth Circuit held that the administrative forfeiture action provided an opportunity for the owner to secure prompt, interim relief. The owner also had the right to file for remission promptly after the guns were seized, the right to trigger the filing of a judicial forfeiture proceeding, and the right to recover the guns pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure. *Id.* at 424, 425.

The owner ignored all of those readily available interim remedies and then demanded dismissal of the forfeiture action. The issue in *Ninety-Three Firearms*, therefore, was not whether the owner had the right to post-seizure, interim remedies. He had many such remedies but chose to ignore them. Since he was demanding dismissal rather than access to an interim remedy, his claim was subject to review under the *Barker* criteria.

The same is true for *United States v. Turner*, 933 F.2d 240 (4th Cir. 1991), *Nnadi v. Richter*, 976 F.2d 682 (11th Cir. 1992) and *United States v. $47,980 in Canadian Currency*, 804 F.2d 1085 (9th Cir. 1986), the other cases cited by Devine. (Pet., at 19, 34). For example, the delay in *Turner* "was as much attributable to Turner's decision to defer asserting his right to return of the vehicle . . . as to the government." *Turner*, 933 F.2d at 246. In *Nnadi*, "a prompt hearing would have ensued if the

[owner] had filed a claim" and, in any event, an administrative forfeiture was filed with only a "relatively short delay" of "forty days . . ." *Nnadi*, 976 F.2d at 687. The property owners in *Forty-Seven Thousand Nine Hundred Eighty Dollars ($47,980) in Canadian Currency* likewise did not avail themselves of their right to expedite judicial forfeiture. As that court noted, "The failure to request immediate judicial proceedings suggest that an early judicial hearing was not desired." *$47,980*, 804 F.2d at 1089. Thus, in all of the cases cited by Devine, the property owners had access to an array of prompt, post-seizure remedies yet the claimants demanded dismissal of the forfeiture actions. Because the claimants were seeking dismissal, rather than access to interim remedies, their cases were subject to review under *Barker* rather than *Mathews*.

E. The Issue Presented Does Not Arise When The Federal Government Seizes Property For Forfeiture.

Review also is not warranted because Devine and the City have staked out an idiosyncratic position that is irreconcilable with standard, post-seizure practices throughout the federal system.

Federal forfeiture statutes and regulations include multiple, post-seizure remedies that ameliorate the harm to owners who must wait months for a forfeiture trial. First, a federal claimant "can file an equitable action seeking an order compelling the filing of the forfeiture or return of the seized property." *United States v. Eight Thousand Eight Hundred and Fifty Dollars (8,850)*, 461 U.S. 555, 569 (1983) (citing *Slocum*

v. Mayberry, 15 U.S. (2 Wheat) 1, 10, 4 L. Ed. 169 (1817)). Second, in federal forfeiture proceedings property owners can file a motion for return of their property pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure. *Id.* Third, a property owner can avail himself of federal remission and mitigation procedures (19 U.S.C. § 1618 and 19 C.F.R. § 162.31(a)) and some relief is granted in an "estimated 75% of the petitions . . ." *$8,850*, 461 U.S. at 558. Fourth, any delay in acting on a mitigation request can be prevented by filing suit to compel the agency to act. 5 U.S.C. § 706(1). Fifth, a 10% bond can be posted to secure the release of vehicles and other essential items. 19 U.S.C. §§ 1608 and 1614.

None of those interim remedies was available to Plaintiffs. The Illinois DAFPA does not expressly prohibit interim remedies like those that are always available in federal forfeiture actions. Devine, however, does not provide any process other than the forfeiture trial, which is often delayed for many months following the seizure. Because Plaintiffs' cause of action was necessitated by the absence of an interim remedy, like those that the federal government offers, the case does not warrant review by this Court.

II. The Court Did Not Impose A Mandatory Injunction.

The Seventh Circuit remanded the case to the District Court to "fashion appropriate relief consistent" with the Court's opinion. (P. App. 10). The Court did not make findings of fact, did not order a specific time table for the post-seizure hearings, and did not attempt to describe the scope of the hearings. *Id.* Devine cannot in good faith maintain that interim, post-seizure hearings are offered because he insists that the only process that is due is the forfeiture trial. (Pet. at 23-27). So, all the Seventh Circuit ordered was an application of the *Mathews* criteria to the facts, once all of the facts are known. If it were to turn out that Devine is not to blame or some as yet undisclosed interim relief actually exists, the District Court would be required to take those facts and that remedy into account.

CONCLUSION

For all of these reasons, the Court should deny the petition for certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX

IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

No. 06 C 6423

CHERMANE SMITH, EDMANUEL PEREZ, TYHESHA BRUNSTON, MICHELLE WALDO, KIRK YUNKER, and TONY WILLIAMS,

Plaintiffs,

v.

CITY OF CHICAGO, PHILIP J. CLINE, SUPERINTENDENT of POLICE and RICHARD DEVINE, COOK COUNTY STATES ATTORNEY

Defendants.

CLASS ACTION COMPLAINT

Plaintiffs through their attorneys, THOMAS PETERS, JAYNE INGLES, and KEVIN PETERS, state:

Appendix

COUNT I

CLASS ACTION FOR DECLARATORY AND INJUNCTIVE RELIEF PARTIES, JURISDICTION AND VENUE

1. Plaintiffs are persons from whom Chicago police officers seized property during the last two years.

2. As to Plaintiffs, Kirk Yunker and Tony Williams, the seized property is still in the custody of the Chicago Police Department pending review by the Chicago Police Department prior to a recommendation that the property should be submitted to the Cook County State's Attorney for forfeiture.

3. As to Plaintiffs, Chermane Smith, Edmanuel Perez, Michelle Waldo, and Tyhesha Brunston, the seized property is still in the custody of the Chicago Police Department but the Chicago Police Department has recommended to Defendant Devine that a forfeiture action should be filed and Defendant Devine, acting through his employees and agents, has initiated a forfeiture action.

4. Defendant, Philip Cline, is the Superintendent of Police and in that capacity he sets and implements the policies of the City of Chicago, as they relate to property seized by Chicago police officers. He is sued in his official capacity.

5. Defendant, City of Chicago, is a municipality organized under the laws of the State of Illinois and is the employer of Defendant Cline.

6. Defendant, Richard Devine, is the Cook County State's Attorney and in that capacity he sets and implements the policies of that agency, as they relate to property that is seized by the police and is subject to forfeiture. He is sued in his official capacity

7. Plaintiffs are all persons who had property seized by Chicago police officers, their property is being detained by the Chicago Police Department, acting in conjunction with Richard Devine, and his agents and employees, and Plaintiffs have not been afforded a prompt post-seizure hearing to determine probable cause to continue to detain their property.

9. This suit is brought pursuant to 42 U.S.C. Sec. 1983 for violations of the Plaintiffs' constitutional right to a prompt post-seizure probable cause hearing, as required by the Fifth and Fourteenth Amendments of the Constitution of the United States.

10. The Court has jurisdiction pursuant to 28 U.S.C. 1343.

11. All of the acts alleged herein occurred in Cook County, Illinois, and all of the acts alleged herein were made under color of state law.

Appendix

THE FORFEITURE SYSTEM

12. The City of Chicago and Superintendent Cline are authorized by state law to take 52 days following a seizure of property to decide whether the City intends to recommend that the State's Attorney seek forfeiture of the seized property. 725 ILCS 150\5.

13. During those 52 days it is the policy and practice of the City and Cline to refuse to return the seized property upon demand by the owner.

14. Neither the City nor any other government entity, agency or court reviews the seizure and there is no provision under Illinois law for a probable cause to detain hearing during the 52 days allotted to the City for forfeiture review.

15. Following the City's 52 allotted days, Devine, and the Cook County State's Attorney's office, have an additional 45 days to review the forfeiture recommendation of the Chicago Police Department. 725 ILCS 150\6(A).

16. During those 45 days it is the policy and practice of Devine to refuse to return the seized property upon demand by the owner.

17. If the Cook County State's Attorney's office decides to seek forfeiture, notice is mailed to the last known address of the property owner, who then must file a written claim and post bond.

18. There is no provision under Illinois law for a probable cause to detain hearing, during the 45 days allotted to the State's Attorney to decide whether to seek forfeiture of seized property.

19. In those cases when the Cook County State's Attorney elects to file a forfeiture action, three to four more weeks pass following the issuance of notice of forfeiture by the State's Attorney before the answer and bond are filed with the court.

20. Until such time as an answer is filed and bond is posted, or excused by the court, the property owner cannot have the merits of his case reviewed by a judicial officer.

21. Under Illinois law, as applied and enforced by the Defendants acting in conjunction with each other, a person from whom property is seized is not afforded a judicial or administrative hearing to determine probable cause to detain within 120 days of the seizure.

POST DEPRIVATION PROBABLE CAUSE HEARINGS ARE NOT PROVIDED

22. Plaintiffs had property seized by Chicago Police officers, who did not have judicially authorized warrants to seize the confiscated property.

23. Plaintiffs have not been afforded a prompt post-seizure probable cause to detain hearing.

24. Plaintiffs have had property detained by Defendants for more than 10 days without a probable cause to detain hearing.

25. On or about January 19, 2006, Chermane Smith's 1981 Chevrolet Caprice was seized by Chicago police officers. Ms. Smith was not charged with a criminal offense when the car was seized and Defendants did not hold a post-seizure probable cause to detain hearing. A forfeiture action (2006 COFO 000036) was filed and is pending.

26. On or about March 8, 2006, Edmanuel Perez's 1999 Chevrolet Malibu was seized by Chicago police officers. Mr. Perez was not charged with a criminal offense when his vehicle was seized and Defendants did not hold a post-seizure probable cause to detain hearing. A forfeiture action (2006 COFO 000288) was filed and is pending.

27. On or about April 8, 2006, Tyhesha Brunston's 2004 Chevrolet Impala was seized by Chicago police officers. Ms Brunston was not charged with a criminal offense when her vehicle was seized and Defendants did not hold a post-seizure probable cause to detain hearing. A forfeiture action (2006 COFO 000296) was filed and is pending.

28. On or about January 20, 2006 Michelle Waldo had $1,500.00 dollars seized by Chicago police officers. Ms. Waldo was not charged with a criminal offense when her money was seized and Defendants did not hold a post-seizure probable cause to detain hearing. A forfeiture action (2006 COFO 000201) was filed and is pending

29. On or about September 26, 2006, Kirk Yunker had cash seized by Chicago police officers. Mr. Yunker was later indicted but Defendants have not held a post-seizure probable cause to detain hearing. No forfeiture action has been filed but the cash seized from Mr. Yunker remains in the custody of the Chicago Police department.

30. In July, 2006, Tony Williams had cash seized by Chicago police officers. Mr. Williams was charged with a criminal offense but the charges have been dismissed. Defendants have not held a post-seizure probable cause to detain hearing. No forfeiture action has been filed but the cash seized from Mr. Williams remains in the custody of the Chicago Police Department

THE CLASS ALLEGATIONS

31. Plaintiffs represent a class of persons who have had, or will have, property seized by Chicago police officers, provided the Defendants do not hold a prompt post-seizure probable cause to detain hearing.

32. Plaintiffs believe the number of potential class members exceeds 5,000 (five thousand) persons annually.

33. As to this class, the Defendants have engaged in a common course of conduct and a common question of law will resolve all their claims. The common issue of constitutional law is whether a person from whom property is seized by a police officer, without a warrant, has the right to a prompt post-seizure determination of probable cause to continue to detain the seized property.

34. The claims of the named Plaintiffs are typical of the claims of all other class members.

35. The Plaintiffs will fairly and adequately represent and protect the interest of the class.

36. Plaintiffs and their counsel can fairly and adequately represent the class.

Wherefore, Plaintiffs pray the Court will a) certify this case as a class action; b) declare that Plaintiffs have a due process right to a prompt post-seizure probable cause hearing; c) declare that the Defendants must hold a post-seizure probable cause hearing within ten business days of any seizure; and d) enjoin Defendants' current practice and policy of seizing property and retaining custody for months without a judicial determination of probable cause.

Respectfully submitted,

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KEVIN PETERS
JAYNE INGLES
ATTORNEYS FOR THE PLAINTIFFS
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JOINT APPENDIX

128 (3)

No. 08-351

Supreme Court, U.S.
FILED
MAY 11 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

ANITA ALVAREZ,
State's Attorney of Cook County, Illinois,

Petitioner,

v.

CHERMANE SMITH, EDMANUEL PEREZ,
TYHESHA BRUNSTON, MICHELLE WALDO,
KIRK YUNKER, and TONY WILLIAMS,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JOINT APPENDIX

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Counsel for Respondents

MAY 11, 2009

* *Counsel of Record*

PETITION FOR CERTIORARI FILED SEPTEMBER 15, 2008
CERTIORARI GRANTED FEBRUARY 23, 2009

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HR3DC 4KGOXS

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Appendix D — Plaintiffs' Motion For Class Certification Filed February 16, 2007 ..... 37a

Appendix E — City Of Chicago's And Superintendent Philip J. Cline's Motion To Dismiss Filed February 16, 2007 ..... 41a

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Appendix G — Defendant Richard A. Devine's Motion To Dismiss Plaintiff's Complaint Filed February 20, 2007 ..... 66a

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Appendix I — Plaintiffs' Response To Defendants' Motion To Dismiss Filed February 21, 2007 ..... 74a

The following opinion, docket entry, and order have been omitted in printing this Joint Appendix because they appear in the Appendix of the Petition for a Writ of Certiorari on the following pages:

Opinion Of The United States Court Of Appeals For The Seventh Circuit Decided May 2, 2008 ..... 1a

Docket Entry From The United States District Court For The Northern District Of Illinois Dated February 22, 2007 ..... 12a

Order Of The United States Court Of Appeals For The Seventh Circuit Denying Petition For Rehearing Dated June 16, 2008 ..... 13a

APPENDIX A — RELEVANT DOCKET ENTRIES OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

General Docket
U.S. Court of Appeals for the Seventh Circuit

Docketed: 03/16/2007

Court of Appeals Docket #: 07-1599
Nsuit: 3440 Other Civil Rights
Smith, Chermane, et al v. City of Chicago, et al
Appeal From: United States District Court

Lower court information:

District: 0752-1 : 06 C 6423

Court Reporter: Michael Snyder, Court Reporter
Ordering Judge: Elaine E. Bucklo, Judge
Date Filed: 11/22/06
Date order/judgment: 2/22/07
Date NOA filed: 3/15/07

Fee status: paid

Prior cases:
None

Current cases:
None

Docket as of April 2, 2009 11:00 pm

Appendix A

07-1599 Smith, Chermane, et al v. City of Chicago, et al

CHERMANE SMITH Plaintiff - Appellant	Thomas Peter FAX 312/697-0812 312/697-0022 Suite 1675 [COR LD NTC ret] 407 S. Dearborn Street Chicago, IL 60605 USA
EDMANUEL PEREZ Plaintiff - Appellant	Thomas Peters (See above) [COR LD NTC ret]
TYHESHA BRUNSTON Plaintiff - Appellant	Thomas Peters (See above) [COR LD NTC ret]
MICHELLE WALDO Plaintiff - Appellant	Thomas Peters (See above) [COR LD NTC ret]
KIRK YUNKER Plaintiff - Appellant	Thomas Peters (See above) [COR LD NTC ret]

v.

Appendix A

CITY OF CHICAGO Defendant - Appellee	Benna R. Solomon FAX 312/744-3588 312/744-7764 Room 800 [COR LD NTC ret] Julian Henriquez FAX 312/744-3588 312/744-6793 [COR LD NTC ret] Kerrie Maloney Laytin FAX 312/744-3588 312/744-0746 Suite 800 [COR LD NTC ret] OFFICE OF THE CORPORATION COUNSEL Appeals Division 30 N. LaSalle Street Chicago, IL 60602 USA
PHILIP CLINE, Superintendent, Chicago Police Department Defendant - Appellee	Kerrie Maloney Laytin (See above) [COR LD NTC ret]

Appendix A

RICHARD A. DEVINE,
Cook County
State's Attorney
Defendant - Appellee

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Chicago, IL 60602
USA

Appendix A

07-1599 Smith, Chermane, et al v. City of Chicago, et al

CHERMANE SMITH, EDMANUEL PEREZ,
TYHESHA BRUNSTON, et al.,

Plaintiffs - Appellants

v.

CITY OF CHICAGO, PHILIP CLINE, Superintendent,
Chicago Police Department and
RICHARD A. DEVINE,
Cook County State's Attorney,

Defendants - Appellees

3/16/07 Private civil case docketed. [07-1599] [2085347-1] Transcript information sheet due by 3/26/07. Appellant's brief due on or before 4/25/07 for Chermane Smith, for Perez Edmanuel, for Tyhesha Brunston, for Michelle Waldo, for Kirk Yunker. (juli)

* * *

3/16/07 Filed Appellant Chermane Smith, Appellant Perez Edmanuel, Appellant Tyhesha Brunston, Appellant Michelle Waldo, Appellant Kirk Yunker docketing statement. [07-1599] [2085363-1] (juli)

Appendix A

3/20/07	ORDER: A review of the short record reveals that this appeal involves more than one appellee represented by different counsel. Counsel for appellees are encouraged to file a joint brief and appendix or adopt parts of a co-appellee?s brief. The parties are reminded that redundant and uncoordinated briefing will be stricken. See United States v. Torres, 170 F.3d 749 (7th Cir. 1999); United States v. Ashman, 964 F.2d 596 (7th Cir. 1992). DW [07-1599] (hard)

* * *

4/9/07	Original record on appeal filed. Contents of record: 1 vol. pleadings. [07-1599] [2091990-1] (greg)
4/20/07	Filed motion by Appellant Chermane Smith, Appellant Perez Edmanuel, Appellant Tyhesha Brunston, Appellant Michelle Waldo, Appellant Kirk Yunker to extend time to file appellant's brief. [2095978-1] [07-1599] (trot)
4/23/07	ORDER issued GRANTING motion for extension of time to file appellants' brief. [2095978-1] JKL [07-1599] 1. Appellants' brief due 5/29/07 for Kirk Yunker, for Michelle Waldo, for Tyhesha Brunston, for Perez Edmanuel, for Chermane Smith. 2. The appellee(s) briefs are due on or before

6/28/07 for Richard A. Devine, for Philip Cline, for City of Chicago. 3. The reply brief, if any, is due 7/12/07 for Kirk Yunker, for Michelle Waldo, for Tyhesha Brunston, for Perez Edmanuel, for Chermane Smith. (hard)

* * *

5/29/07 Filed 15c appellant's brief by Chermane Smith, Perez Edmanuel, Tyhesha Brunston, Michelle Waldo, Kirk Yunker. Electronically Transmitted. [07-1599] [0-0] (kare)

5/29/07 Disclosure Statement filed by Thomas Peters for Appellant Kirk Yunker, Appellant Michelle Waldo, Appellant Tyhesha Brunston, Appellant Perez Edmanuel, Appellant Chermane Smith. [07-1599] [2085347-1] (kell)

6/21/07 Filed motion by Appellee City of Chicago, Appellee Philip Cline to extend time to file appellee's brief. [2114977-1] [07-1599] (stef)

6/25/07 ORDER issued GRANTING motion for extension of time to file appellees' brief. [2114977-1] SCR [07-1599] 1. Appellees' brief due 7/30/07 for Richard A. Devine, for Philip Cline, for City of Chicago . 2. The reply briefs, if any, is due on 8/13/07 for Kirk

Yunker, for Michelle Waldo, for Tyhesha Brunston, for Perez Edmanuel, for Chermane Smith. (hard)

6/25/07 Filed motion by Appellee Richard A. Devine to extend time to file appellee's brief. [2115660-1] [07-1599] (hard)

6/27/07 ORDER re: (1) Motion for extension of time. In light of this court's order dated 6/25/07, #1 is DENIED as unnecessary. [2115660-1] CMD [07-1599] (kell)

7/23/07 Filed motion by Appellee City of Chicago, Appellee Philip Cline, Appellee Richard A. Devine to extend time to file appellee's brief. [2123984-1] [07-1599] (intn)

7/23/07 Filed motion by Appellee City of Chicago, Appellee Philip Cline to extend time to file appellee's brief. [2124216-1] [07-1599] (stef)

7/25/07 ORDER issued GRANTING motions for extension of time to file appellees' briefs. [2123984-1] [2124216-1] CMD [07-1599] 1. Appellees' briefs due 8/29/07 for Richard A. Devine, for Philip Cline, for City of Chicago. 2. The reply briefs if any is due on 9/12/07 for Kirk Yunker, for Michelle Waldo, for Tyhesha Brunston, for Perez Edmanuel, for Chermane Smith. (kell)

Appendix A

8/22/07	Filed motion by Appellee Richard A. Devine to extend time to file appellee's brief. [2133458-1] [07-1599] (kare)
8/22/07	Filed motion by Appellee City of Chicago, Appellee Philip Cline to extend time to file appellee's brief. [2133542-1] [07-1599] (kare)
8/23/07	ORDER issued GRANTING motions for extension of time to file appellees's briefs. [2133458-1] [2133542-1] CMD [07-1599] 1. Appellees' briefs due 9/28/07 for Richard A. Devine, for Philip Cline, for City of Chicago. 2. The reply brief if any is due on 10/12/07 for Kirk Yunker, for Michelle Waldo, for Tyhesha Brunston, for Perez Edmanuel, for Chermane Smith. (hard)
9/21/07	Filed motion by Appellee Richard A. Devine to extend time to file appellee's brief. [2144574-1] [07-1599] (amyd)
9/24/07	ORDER issued GRANTING motion for extension of time to file appellee's brief. [2144574-1] CMD [07-1599] 1. Appellee's brief due 10/12/07 for Richard A. Devine. 2. The reply brief if any is due on 10/26/07 for Kirk Yunker, for Michelle Waldo, for Tyhesha Brunston, for Perez Edmanuel, for Chermane Smith. (alys)

9/28/07	Filed 15c appellee's brief by City of Chicago, Philip Cline. Disk filed. [07-1599] [0-0] (josh)
10/4/07	Attorney Benna R. Solomon added for Appellee City of Chicago, for purposes of oral argument. [07-1599], (andb)

* * *

10/12/07	Filed 15c appellee's brief by Richard A. Devine. Disk filed. [07-1599] [0-0] (rosa)
10/23/07	Filed motion by Appellant Chermane Smith, Appellant Perez Edmanuel, Appellant Tyhesha Brunston, Appellant Michelle Waldo, Appellant Kirk Yunker to extend time to file appellant's reply brief. [2154430-1] [07-1599] (fern)
10/24/07	ORDER issued GRANTING motion for extension of time to file appellant's reply brief. [2154430-1] CMD [07-1599] Appellant's reply brief due 11/16/07 for Kirk Yunker, for Michelle Waldo, for Tyhesha Brunston, for Perez Edmanuel, for Chermane Smith. (amil)
11/9/07	ORDER: Argument set for Friday, January 11, 2008 at 10:00 a.m. Each side limited to 10 minutes. [07-1599] [2160453-1] (andb)

Appendix A

11/15/07 Filed motion by Appellant Chermane Smith, Appellant Perez Edmanuel, Appellant Tyhesha Brunston, Appellant Michelle Waldo, Appellant Kirk Yunker to extend time to file appellants' reply brief. [2162211-1] [07-1599] (sara)

11/16/07 ORDER issued GRANTING motion for extension of time to file appellant's reply brief. [2162211-1] CMD [07-1599] Appellant's reply brief due 11/20/07 for Kirk Yunker, for Michelle Waldo, for Tyhesha Brunston, for Perez Edmanuel, for Chermane Smith. (amil)

11/19/07 Oral argument confirmation card filed by attorney(s) Benna R. Solomon for Appellee City of Chicago, Appellee Philip Cline. [2085347-1] (andb)

11/21/07 Filed instanter motion by Appellant Chermane Smith, Appellant Perez Edmanuel, Appellant Tyhesha Brunston, Appellant Michelle Waldo, Appellant Kirk Yunker to file appellants' reply brief. [2164770-1] [07-1599] [2164770-1] (alys)

11/26/07 ORDER issued GRANTING instanter motion to file appellant's reply brief. [2164770-1] The clerk of this court is directed to file instanter the tendered copies of the reply brief. [2164506-1] CMD [07-1599] (alys)

11/26/07	Filed 15c appellant's reply brief by Chermane Smith, Perez Edmanuel, Tyhesha Brunston, Michelle Waldo, Kirk Yunker, per order. Disk filed. [07-1599] [0-0] (rosa)
11/28/07	Oral argument confirmation card filed by attorney(s) Thomas Peters for Appellant Chermane Smith, Appellant Perez Edmanuel, Appellant Tyhesha Brunston, Appellant Michelle Waldo, Appellant Kirk Yunker. [07-1599] [2085347-1] (rosa)
12/6/07	Added attorney Paul Castiglione per oral argument confirmation card, filed for Appellee Richard A. Devine. [07-1599] [2085347-1] (andb)
12/17/07	Added attorney Julian Henriques per oral argument confirmation phone call, for Appellee City of Chicago. [07-1599] [2085347-1] (andb)
1/11/08	Case heard and taken under advisement by panel: Circuit Judge William J. Bauer, Circuit Judge Richard A. Posner, Circuit Judge Terence T. Evans. [07-1599] [2177436-1] (trot)

Appendix A

1/11/08	Case argued by Paul A. Castiglione for Appellee Richard A. Devine, Julian Henriques for Appellee City of Chicago, Thomas Peters for Appellant Kirk Yunker, Appellant Michelle Waldo, Appellant Tyhesha Brunston, Appellant Perez Edmanuel, Appellant Chermane Smith. [07-1599] [2085347-1] (trot)
5/2/08	Filed opinion of the court by Judge Evans. Because our opinion signals a reversal of course from Jones, we have circulated it under Circuit Rule 40(e) to all judges of the court in regular active service (Judge Rovner, however, did not participate in this case) and no judge voted to rehear the matter en banc. REVERSED and REMANDED. Circuit Judge William J. Bauer, Circuit Judge Richard A. Posner, Circuit Judge Terence T. Evans. [07-1599] [2085347-1] (kell)
5/2/08	ORDER: Final judgment filed per opinion. With costs: y. [07-1599] [2213020-1] (kell)
5/16/08	Filed 15c Petition for Rehearing by Appellee Richard A. Devine. Dist. [07-1599] [2217862-1] (sara)
6/16/08	ORDER: Appellee Richard A. Devine Petition for Rehearing is DENIED. [07-1599] [2217862-1] (sara)

6/24/08	MANDATE ISSUED. Record on appeal to be returned later. (Contents to be returned: 1 vol. pleadings.) [07-1599] [2213022-1] (cove)
6/24/08	Original record returned to the District Court. (Contents returned: 1 vol. pleadings.) [07-1599] [0-0] (cove)

* * *

7/1/08	Filed Appellant Kirk Yunker, Appellant Michelle Waldo, Appellant Tyhesha Brunston, Appellant Edmanuel Perez, Appellant Chermane Smith response to Appellee Richard A. Devine motion to recall case and stay mandate. [2230781-1] [2230781-1] [07-1599] (kell)
7/3/08	ORDER issued GRANTING motion to recall the mandate. The mandate in this appeal is RECALLED and hereby STAYED pending the filing of a petition to the Supreme Court for writ of certiorari: See F.R.A.P. 41(d). [07-1599] [2228621-1] (amil)
9/18/08	Notice from Paul A. Castiglione for Appellee Richard A. Devine of the filing of a Petition for Writ of Certiorari. [07-1599] [2241453-1] (mank)

Appendix A

9/22/08	Filed notice from the Supreme Court of the filing of a Petition for Writ of Certiorari. Supreme Court Case No.: 08-351. [07-1599] [2241665-1] (hard)
3/2/09	Filed order from the Supreme Court GRANTING the Petition for Writ of Certiorari limited to Question 1 presented by the petition. Supreme Court Case No.: 08-351. [07-1599] [2247834-1] (hudk)

* * * *

APPENDIX B — RELEVANT DOCKET ENTRIES OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS (Chicago)

United States District Court
Northern District of Illinois -
CM/ECF LIVE, Ver 3.2.2 (Chicago)
CIVIL DOCKET FOR CASE #: 1:06-cv-06423

Smith et al v. City Of Chicago et al
Assigned to: Honorable Elaine E. Bucklo
Case in other court: 07-01599
Cause: 42:1983 Civil Rights Act

Date Filed: 11/22/2006
Date Terminated: 07/28/2008
Jury Demand: None
Nature of Suit: 440 Civil Rights: Other
Jurisdiction: Federal Question

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represented by

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Plaintiff

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Appendix B

V.

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City Of Chicago

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Superintendent of Police

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Kim Renee Walberg
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Suzanne L Sias
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Defendant

Richard Devine
Cook County States Attorney

represented by

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ATTORNEY TO BE NOTICED

Appendix B

Date Filed	#	Docket Text
11/22/2006	1	COMPLAINT filed by Tyhesha Brunston, Michelle Waldo, Kirk Yunker, Tony Williams, Chermane Smith, Edmanuel Perez. (td,) (Entered: 11/28/2006)
		* * *
11/22/2006	7	SUMMONS Issued as to Defendants City of Chicago, Philip J Cline, RichardDevine. (td,) (Entered: 11/28/2006)
12/18/2006	8	SUMMONS Returned Executed by Tyhesha Brunston, Michelle Waldo, Kirk Yunker, Tony Williams, Chermane Smith, Edmanuel Perez as to Philip J Cline on 12/1/2006, answer due 12/21/2006. (Peters, Thomas) (Entered: 12/18/2006)
12/18/2006	9	SUMMONS Returned Executed by Tyhesha Brunston, Michelle Waldo, Kirk Yunker, Tony Williams, Chermane Smith, Edmanuel Perez as to City Of Chicago on 11/28/2006, answer due 12/18/2006. (Peters, Thomas) (Entered: 12/18/2006)

Appendix B

12/18/2006	10	SUMMONS Returned Executed by Tyhesha Brunston, Michelle Waldo, Kirk Yunker, Tony Williams, Chermane Smith, Edmanuel Perez (Attachments: # 1 Certificate of Service Notice to Process Server) (Peters, Thomas) (Entered: 12/18/2006)
12/21/2006	11	ATTORNEY Appearance for Defendant Richard Devine by John P. Heil, Jr (Heil, John) (Entered: 12/21/2006)
12/21/2006	12	MOTION by Defendant Richard Devine for extension of time to file answer, *move or otherwise plead* (Heil, John) (Entered: 12/21/2006)

* * *

12/22/2006	14	MINUTE entry before Judge Elaine E. Bucklo: Moving defendant's motion forextension of time until 1/29/07 to answer or otherwise plead is granted. Scheduling Conference set for 2/16/2007 at 09:45 AM.At least threedays prior to the conference, the parties shall meet and submit to the court a report in the form found on Judge Bucklo's web page under Report of Parties' Planning Meeting. Mailed notice (mpj,) (Entered: 12/22/2006)

Appendix B

12/26/2006	15	ATTORNEY Appearance for Defendants City Of Chicago, Philip J Cline byAllan T. Slagel (Slagel, Allan) (Entered: 12/26/2006)
12/26/2006	16	MOTION by Defendants City Of Chicago, Philip J Cline for extension of timeto file answer regarding complaint *or file other responsive pleading* (Slagel, Allan) (Entered: 12/26/2006)

* * *

12/29/2006	19	MINUTE entry before Judge Elaine E. Bucklo: Moving defendants' motion for extension of time until 2/9/07 to answer or otherwise plead is granted. Mailed notice (mpj,) (Entered: 12/29/2006)

* * *

01/25/2007	21	MOTION by Defendant Richard Devine for extension of time to file answer, *move or otherwise plead* (Heil, John) (Entered: 01/25/2007)

* * *

Appendix B

01/25/2007	23	MINUTE entry before Judge Elaine E. Bucklo: Defendant Richard Devine's motion for extension of time until 2/20/07 to to answer or otherwise plead is granted. Scheduling Conference set for 2/16/07 is reset for 3/9/2007 at 09:45AM. Mailed notice (mpj,) (Entered: 01/25/2007)
02/02/2007	24	MOTION by Defendants City Of Chicago, Philip J Cline for extension of time to file answer regarding complaint *or otherwise plead* (Attachments: Exhibit 1)(Slagel, Allan) (Entered: 02/02/2007)

* * *

02/05/2007	26	MINUTE entry before Judge Elaine E. Bucklo: Defendants' motion for extension of time until 2/20/07 to answer or otherwise plead is granted. Mailed notice (mpj,) (Entered: 02/05/2007)

* * *

02/16/2007	28	MOTION by Defendants City of Chicago, Philip J Cline to dismiss *Plaintiffs' Class Action Complaint* (Slagel, Allan) (Entered: 02/16/2007)

Appendix B

02/16/2007	29	MEMORANDUM by City Of Chicago, Philip J Cline in support of motion to dismiss (Attachments: Exhibit A) (Slagel, Allan) (Entered: 02/16/2007)

* * *

02/16/2007	31	MOTION by Plaintiffs Tyhesha Brunston, Michelle Waldo, Kirk Yunker, Tony Williams, Chermane Smith, Edmanuel Perez to certify class (Peters, Thomas)(Entered: 02/16/2007)

* * *

02/20/2007	33	MOTION by Defendant Richard Devine to dismiss (Heil, John) (Entered: 02/20/2007)
02/20/2007	35	MEMORANDUM by Richard Devine in support of motion to dismiss (Heil, John) (Entered: 02/20/2007)
02/21/2007	36	RESPONSE by Tyhesha Brunston, Michelle Waldo, Kirk Yunker, Tony Williams, Chermane Smith, Edmanuel Perez to MOTION by Defendant Richard Devine to dismiss (Peters, Thomas) (Entered: 02/21/2007)

* * *

Appendix B

02/22/2007	38	MINUTE entry before Judge Elaine E. Bucklo: Defendants motions (28 and 33) to dismiss complaint heard and the motions are granted. As plaintiffs counsel admits, this court is bound by the decision in Jones Vs. Takaki, 38 F. 3rd 321 (7th Cir. 1994) plaintiffs' motion to certify class is denied as moot. Civil case terminated. Mailed notice (mpj,) (Entered: 02/22/2007)
02/22/2007	39	ENTERED JUDGMENT Signed by Judge Elaine E. Bucklo on 2/22/2007: Mailed notice (mpj,) (Entered: 02/22/2007)
03/15/2007	40	NOTICE of appeal by Tyhesha Brunston, Michelle Waldo, Kirk Yunker, Tony Williams, Chermane Smith, Edmanuel Perez regarding orders 38, 39; Filing fee $ 455.00 paid; Receipt number 106469 (dj,) (Entered: 03/19/2007)

* * *

Appendix B

06/24/2008	52	MANDATE of USCA dated 5/2/2008 regarding notice of appeal; USCA No. 07-1599; The judgment of the District Court is Reversed, with costs, and Remanded in accordance with the decision of this court entered on this date. (gej,) (Entered: 06/26/2008)
06/24/2008	53	OPINION from the USCA for the 7th Circuit; Argued 1/11/2008; Decided 5/2/2008 in USCA case no. 07-1599. (gej,) (Entered: 06/26/2008)

* * * *

APPENDIX C — CLASS ACTION COMPLAINT FILED NOVEMBER 22, 2006

IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

06CV6423
JUDGE BUCKLO
MAGISTRATE JUDGE COLE

CHERMANE SMITH, EDMANUEL PEREZ, TYHESHA BRUNSTON, MICHELLE WALDO KIRK YUNKER, AND TONY WILLIAMS,

Plaintiffs,

v.

CITY OF CHICAGO, PHILIP J. CLINE, SUPERINTENDENT of POLICE and RICHARD DEVINE, COOK COUNTY STATES ATTORNEY

Defendants.

CLASS ACTION COMPLAINT

Plaintiffs through their attorneys, THOMAS PETERS, JAYNE INGLES, and KEVIN PETERS, state:

Appendix C

COUNT I

CLASS ACTION FOR DECLARATORY AND INJUNCTIVE RELIEF

PARTIES, JURISDICTION AND VENUE

1. Plaintiffs are persons from whom Chicago police officers seized property during the last two years.

2. As to Plaintiffs, Kirk Yunker and Tony Williams, the seized property is still in the custody of the Chicago Police Department pending review by the Chicago Police Department prior to a recommendation that the property should be submitted to the Cook County State's Attorney for forfeiture.

3. As to Plaintiffs, Chermane Smith, Edmanuel Perez, Michelle Waldo, and Tyhesha Brunston, the seized property is still in the custody of the Chicago Police Department but the Chicago Police Department has recommended to Defendant Devine that a forfeiture action should be filed and Defendant Devine, acting through his employees and agents, has initiated a forfeiture action.

4. Defendant, Philip Cline, is the Superintendent of Police and in that capacity he sets and implements the policies of the City of Chicago, as they relate to property seized by Chicago police officers. He is sued in his official capacity.

Appendix C

5. Defendant, City of Chicago, is a municipality organized under the laws of the State of Illinois and is the employer of Defendant Cline.

6. Defendant, Richard Devine, is the Cook County State's Attorney and in that capacity he sets and implements the policies of that agency, as they relate to property that is seized by the police and is subject to forfeiture. He is sued in his official capacity.

7. Plaintiffs are all persons who had property seized by Chicago police officers, their property is being detained by the Chicago Police Department, acting in conjunction with Richard Devine, and his agents and employees, and Plaintiffs have not been afforded a prompt post-seizure hearing to determine probable cause to continue to detain their property.

9. This suit is brought pursuant to 42 U.S.C. Sec. 1983 for violations of the Plaintiffs' constitutional right to a prompt post-seizure probable cause hearing, as required by the Filth and Fourteenth Amendments of the Constitution of the United States.

10. The Court has jurisdiction pursuant to 28 U.S.C. 1343.

11. All of the acts alleged herein occurred in Cook County, Illinois, and all of the acts alleged herein were made under color of state law.

Appendix C

THE FORFEITURE SYSTEM

12. The City of Chicago and Superintendent Cline are authorized by state law to take 52 days following a seizure of property to decide whether the City intends to recommend that the State's Attorney seek forfeiture of the seized property. 725 JLCS 150/5.

13. During those 52 days it is the policy and practice of the City and Cline to refuse to return the seized property upon demand by the owner.

14. Neither the City nor any other government entity, agency or court reviews the seizure and there is no provision under Illinois law for a probable cause to detain hearing during the 52 days allotted to the City for forfeiture review.

15. Following the City's 52 allotted days, Devine, and the Cook County State's Attorney's office, have an additional 45 days to review the forfeiture recommendation of the Chicago Police Department. 725 ILCS 150\6(A).

16. During those 45 days it is the policy and practice of Devine to refuse to return the seized property upon demand by the owner.

17. If the Cook County State's Attorney's office decides to seek forfeiture, notice is mailed to the last known address of the property owner, who then must file a written claim and post bond.

18. There is no provision under Illinois law for a probable cause to detain hearing, during the 45 days allotted to the State's Attorney to decide whether to seek forfeiture of seized property.

19. In those cases when the Cook County State's Attorney elects to file a forfeiture action, three to four more weeks pass following the issuance of notice of forfeiture by the State's Attorney before the answer and bond are filed with the court.

20. Until such time as an answer is filed and bond is posted, or excused by the court, the property owner cannot have the merits of his case reviewed by a judicial officer.

21. Under Illinois law, as applied and enforced by the Defendants acting in conjunction with each other, a person from whom property is seized is not afforded a judicial or administrative hearing to determine probable cause to detain within 120 days of the seizure.

POST DEPRIVATION PROBABLE CAUSE HEARINGS ARE NOT PROVIDED

22. Plaintiffs had property seized by Chicago Police officers, who did not have judicially authorized warrants to seize the confiscated property.

23. Plaintiffs have not been afforded a prompt post-seizure probable cause to detain hearing.

24. Plaintif's have had property detained by Defendants for more than 10 days without a probable cause to detain hearing.

25. On or about January 19, 2006, Chermane Smith's 1981 Chevrolet Caprice was seized by Chicago police officers. Ms. Smith was not charged with a criminal offense when the car was seized and Defendants did not hold a post-seizure probable cause to detain hearing. A forfeiture action (2006 COFO 000036) was filed and is pending.

26. On or about March 8, 2006, Edmanuel Perez's 1999 Chevrolet Malibu was seized by Chicago police officers. Mr. Perez was not charged with a criminal offense when his vehicle was seized and Defendants did not hold a post-seizure probable cause to detain hearing. A forfeiture action (2006 COFO 000288) was filed and is pending.

27. On or about April 8, 2006, Tyhesha Brunston's 2004 Chevrolet Impala was seized by Chicago police officers. Ms Brunston was not charged with a criminal offense when her vehicle was seized and Defendants did not hold a post-seizure probable cause to detain hearing. A forfeiture action (2006 COFO 000296) was filed and is pending.

28. On or about January 20, 2006 Michelle Waldo had $1,500.00 dollars seized by Chicago police officers. Ms. Waldo was not charged with a criminal offense when her money was seized and Defendants did not hold a

post-seizure probable cause to detain hearing. A forfeiture action (2006 COFO 000201) was filed and is pending

29. On or about September 26, 2006, Kirk Yunker had cash seized by Chicago police officers. Mr. Yunker was later indicted but Defendants have not held a post-seizure probable cause to detain hearing. No forfeiture action has been filed but the cash seized from Mr. Yunker remains in the custody of the Chicago Police department.

30. In July, 2006, Tony Williams had cash seized by Chicago police officers. Mr. Williams was charged with a criminal offense but the charges have been dismissed. Defendants have not held a post-seizure probable cause to detain hearing. No forfeiture action has been filed but the cash seized from Mr. Williams remains in the custody of the Chicago Police Department

THE CLASS ALLEGATIONS

31. Plaintiffs represent a class of persons who have had, or will have, property seized by Chicago police officers, provided the Defendants do not hold a prompt post-seizure probable cause to detain hearing.

32. Plaintiff's believe the number of potential class members exceeds 5,000 (five thousand) persons annually.

Appendix C

33. As to this class, the Defendants have engaged in a common course of conduct and a common question of law will resolve all their claims. The common issue of constitutional law is whether a person from whom property is seized by a police officer, without a warrant, has the right to a prompt post-seizure determination of probable cause to continue to detain the seized property.

34. The claims of the named Plaintiffs are typical of the claims of all other class members.

35. The Plaintiffs will fairly and adequately represent and protect the interest of the class.

36. Plaintiffs and their counsel can fairly and adequately represent the class.

Wherefore, Plaintiffs pray the Court will a) certify this case as a class action; b) declare that Plaintiffs have a due process right to a prompt post-seizure probable cause hearing; c) declare that the Defendants must hold a post-seizure probable cause hearing within ten business days of any seizure; and d) enjoin Defendants' current practice and policy of seizing property and retaining custody for months without a judicial determination of probable cause.

Respectfully submitted,

THOMAS PETERS
KEVIN PETERS
JAYNE INGLES
ATTORNEYS FOR THE PLAINTIFFS
407 S. Dearborn, Suite 1675
Chicago, IL 60605

APPENDIX D — PLAINTIFFS' MOTION FOR CLASS CERTIFICATION FILED FEBRUARY 16, 2007

IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

No. 06 C 6423

HONORABLE JUDGE
BUCKLO

CHERMANE SMITH, EDMANUEL PEREZ, TYHESHA BRUNSTON, MICHELLE WALDO KIRK YUNKER, and TONY WILLIAMS,

Plaintiffs,

v.

CITY OF CHICAGO, PHILIP J. CLINE, SUPERINTENDENT of POLICE and RICHARD DEVINE, COOK COUNTY STATES ATTORNEY

Defendants.

PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Plaintiffs, by and through their attorneys, Thomas Peters, Jayne Ingles, and Kevin Peters, and pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure, hereby move this Court to enter an order certifying this

case as a class action for declaratory and injunctive relief In support of this Motion Plaintiffs state:

1. The alleged class action claim involves a policy of the City of Chicago, the Chicago Police Department, and the Cook County State's Attorney and the alleged polciy affects thousands of persons annually form whom property is seized and held for forfeiture.

2. The class consists of all those persons who had property taken from them upon their arrests by Chicago police officers provided: a) the property is being held for forfeiture and b) the Defendants have not provided a reasonably prompt post-deprivation hearing. The proposed class includes all such persons from two years prior to commencement of this action to the present.

3. The named Plaintiffs are members of the class in that all of both of them were arrested, had property taken from them, their property is being held for forfeiture and they have not had a reasonably prompt post-deprivation hearing. Plaintiffs are seeking declaratory relief, an injunction, but not damages.

4. There are thousands of class members who were, or will be, subjected to the alleged policy.

5. The class is sufficiently large to satisfy the numerosity requirements of Rule 23(a).

6. The commonality factor of Rule 23(a) is satisfied in that the core facts and the legal issues are the same

for all class members. Every class member was arrested, had property seized and held for forfeiture, and no post deprivation hearing has been held.

7. Plaintiffs' claims arise from a common course of conduct committed by Defendants and there is one question of law that govern all their claims—are Plaintiffs entitled to a post deprivation hearing before the forfeiture trial.

8. Plaintiffs' claims are typical of all class claims in that they had property seized from them upon their arrest; their criminal cases are disposed of; no forfeiture proceeding was commenced; and their property was not promptly returned to them.

9. There are no conflicts between the class representatives and the other class members and the attorneys for the class representatives are experienced civil rights and class action litigators.

10. A class action is the most efficient procedure to resolve these claims.

Appendix D

WHEREFORE, Plaintiffs respectfully request the Court to enter an Order certifying this case as a 23(b)(2) class action for the class of persons defined above.

s/ Thomas Peters
THOMAS PETERS
MARY DeSLOOVER
KEVIN PETERS
Attorneys for Plaintiffs
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APPENDIX E — CITY OF CHICAGO'S AND SUPERINTENDENT PHILIP J. CLINE'S MOTION TO DISMISS FILED FEBRUARY 16, 2007

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

No. 06 C 6423

Judge Elaine Bucklo

CHERMANE SMITH, et al.,

Plaintiffs,

vs.

CITY OF CHICAGO, et al.,

Defendants.

CITY OF CHICAGO'S AND SUPERINTENDENT PHILIP J. CLINE'S MOTION TO DISMISS

Defendants City of Chicago ("City") and Superintendent Philip J. Cline ("Cline"), (collectively, "Defendants"), by and through their undersigned counsel and pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, move to dismiss Plaintiffs' Class Action Complaint, on the ground that they fail to state a claim upon which relief can be granted. The grounds for this motion are set forth in Defendants' Memorandum in Support of its Motion to Dismiss, incorporated herein by reference and filed simultaneously herewith.

WHEREFORE, defendants the City of Chicago and Superintendent Philip Cline pray that this Court grant their motion to dismiss Plaintiffs' Class Action Complaint, with prejudice, and award fees and costs and such other and further relief as this Court deems just and proper. Dated: February 16, 2007 Respectfully submitted,

Respectfully submitted,

THE CITY OF CHICAGO and
SUPERINTENDENT PHILIP J. CLINE

By: s/ Allan T. Slagel
One of their Attorneys

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APPENDIX F — DEFENDANTS CITY OF CHICAGO'S AND SUPERINTENDENT PHILIP J. CLINE'S MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS FILED FEBRUARY 16, 2007

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

No. 06 C 6423

Judge Elaine Bucklo

CHERMANE SMITH, et al.,

Plaintiffs,

vs.

CITY OF CHICAGO, et al.,

Defendants.

DEFENDANTS CITY OF CHICAGO'S AND SUPERINTENDENT PHILIP J. CLINE'S MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS

INTRODUCTION

Through the Complaint, Plaintiffs present the Court with an issue that was decided by the Seventh Circuit almost thirteen (13) years ago in *Jones v. Takaki*, 38 F.3d 321 (7th Cir. 1994). Based on the *Jones* decision,

Plaintiffs' claims are barred by both collateral estoppel and *stare decisis.*

Plaintiffs challenge the constitutionality of the Illinois Drug Asset Forfeiture Act, 725 ILCS 150/1-14, based on its failure to provide for a probable cause hearing after the seizure of property in accordance with its terms. Plaintiffs allege this violates their due process rights and ask the Court to certify a class of "persons who have had, or will have, property seized by Chicago police officers" and are not given a "post-seizure probable cause to detain hearing." (Complaint ¶31.) Presented with the same allegations by the same attorneys, the Seventh Circuit in *Jones* held there was no entitlement to such a hearing. The Seventh Circuit further held that the claims of a named plaintiff could never be typical of other putative class members in this context and, thus, were legally insufficient to maintain a class action. Moreover, Plaintiffs' claims are procedurally deficient since they have not notified the Illinois Attorney General that they are challenging the constitutionality of a state statute.

THE CLASS ACTION COMPLAINT

The Complaint contains a single count entitled "Class Action for Declaratory and Injunctive Relief." (Complaint Count 1.) It purports to be brought "pursuant to 42 U.S.C. Sec. 1983 for violations of the Plaintiffs' constitutional right to a prompt post-seizure probable cause hearing, as required by the Fifth and Fourteenth Amendments of the Constitution of the United States." (Complaint ¶9.)

Appendix F

According to the Complaint, "Plaintiffs had property seized by Chicago police officers, who did not have judicially authorized warrants to seize confiscated property." (Complaint ¶22.) Plaintiffs allege Defendants' actions, in conjunction with the Illinois Drug Asset Forfeiture Procedure Act, 725 ILCS 150/1-14 (the "Act"), violate their constitutional rights because they "have not been afforded a prompt post-seizure probable cause to detain hearing." (Complaint ¶¶12-23.) Plaintiffs purport to "represent a class of persons who have had, or will have, property seized by Chicago police officers, provided the Defendants do not hold a prompt post-seizure probable cause to detain hearing." (Complaint ¶31.)

Plaintiffs request that the Court a) certify the case as a class action; b) declare that Plaintiffs have a due process right to a prompt post-seizure probable cause hearing; c) declare that the Defendants must hold a post-seizure probable cause hearing within ten business days of any seizure; and d) enjoin Defendants' alleged current practice and policy of seizing property and retaining custody for months without judicial determination of probable cause. (Complaint at p. 7, Prayer for Relief.)

JONES v. TAKAKI

In *Jones v. Takaki*, 38 F.3d 321 (7th Cir. 1994), Plaintiffs' counsel in this litigation represented plaintiffs in a putative class action lawsuit under 42 U.S.C. § 1983 alleging that the Act violated the Due Process Clause of the Fourteenth Amendment because it did not

provide for a prompt post-seizure hearing. *Id.* at 322. In *Jones*, the plaintiffs claimed to represent "all persons who have had, or will in the future have, vehicles, money or other property seized by police officers." *Id.* at 323. The *Jones* plaintiffs sought both declaratory and injunctive relief, but did not seek damages. *Id.*

The district court refused to certify the class and subsequently granted summary judgment against the named plaintiffs. *Id.* The Seventh Circuit affirmed. *Id.* The Seventh Circuit found that a fact-specific balancing test was required to be applied to determine the validity of Plaintiffs' claims. *Id.* (citing *U.S. v. $8,850,* 461 U.S. 555 (1983) and *Barker v. Wingo,* 407 U.S. 514 (1972)). Given this individualized analysis, the Seventh Circuit held that the claims of a named plaintiff could never be typical of other putative class members. *Id.* Without typicality, a class action necessarily fails. *Id.*

To avoid the fact-intensive inquiry applied by the Seventh Circuit, the *Jones* plaintiffs attempted to re-characterize their claim as "whether, in light of the fact that the forfeiture proceeding will not occur for some time, they are entitled to a preliminary determination of probable cause." *Id.* at 324. Despite the re-characterization, the Seventh Circuit concluded that Supreme Court precedent required that the same fact-intensive analysis. *Id.* (citing *U.S. v. Von Neumann,* 474 U.S. 242 (1986)). Furthermore, the Seventh Circuit held, in any event, that the Supreme Court previously "made clear that the Constitution does not require any proceeding prior to the actual forfeiture proceeding." *Id.* (citing *Von Neumann,* 474 U.S. at 249).

Appendix F

ARGUMENT

I. PLAINTIFFS' CLAIMS ARE BARRED BY COLLATERAL ESTOPPEL

Collateral estoppel precludes Plaintiffs from bringing this class action because they are members of the putative class who previously unsuccessfully litigated the same issue in *Jones v. Takaki*. *See Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 329 (1979) (defensive collateral estoppel precludes a plaintiff from asserting a claim that the plaintiff previously litigated and lost against another defendant.). "The preclusive effect of a judgment rendered by a federal court depends on national rather than state law." *In the Matter of Bridgestone/Firestone, Inc., Tires Products Liability Lit. ("Bridgestone")*, 333 F.3d 763, 767 (7th Cir. 2003). Under federal law, the "[d]efensive use of collateral estoppel precludes a plaintiff from relitigating identical issues by merely 'switching adversaries.'" *Parklane*, 439 U.S. at 329. Collateral estoppel requires four elements: (1) the issue sought to be precluded must be the same as that involved in the prior action; (2) the issue must have been actually litigated; (3) the determination of the issue must have been essential to the final judgment; and (4) the party against whom estoppel is invoked must be fully represented in the prior action. *See e.g., La Preferida, Inc. v. Cerveceria Modelo, S.A.*, 914 F.2d 900, 905-06 (7th Cir. 1990) (citing *Klingman v. Levinson*, 831 F.2d 1292, 1295 (7th Cir. 1987)). Each of these elements easily is satisfied in this case.

Appendix F

A. The Complaint Presents the Same Issues Decided in *Jones*

Collateral estoppel prevents re-litigation of the "same issue." *See Ross Berger Co., Inc. v. Equitable Life Assurance Society of the U.S.*, 872 F.2d 1331, 1337 (7th Cir. 1989). The issue presented by the Complaint is precisely the same issue previously decided in *Jones*. Like Plaintiffs here, the *Jones* plaintiffs alleged that their due process rights were violated when they failed to receive "a timely post-seizure judicial hearing at which the right of Defendants . . . to detain [their] property could be determined" and because "[t]he property was held without judicial determination of probable cause to seize and detain it." (*Compare Jones*, 38 F.3d at 322-23 *with* Complaint ¶¶9, 12-21.) Like the Plaintiffs here, the *Jones* plaintiffs sought to represent "all persons who have had, or will in the future have, vehicles, money or other property seized by police officers." (*Compare Jones*, 38 F.3d at 323 *with* Complaint ¶¶7, 22, 23.) Like the Plaintiffs here, the *Jones* plaintiffs sought both declaratory and injunctive relief but not damages. (*Compare Jones*, 38 F.3d at 323 *with* Complaint at p. 7, Prayer for Relief.) Thus, the Complaint and the *Jones* litigation involve the "same issue."

B. The *Jones* Plaintiffs Had a Full and Fair Opportunity to Litigate

A party will be bound by collateral estoppel where it had "a full and fair opportunity to litigate on the issue [previously] determined." *Miller Brewing Co. v. Schlitz*

Brewing Co., 605 F.2d 990, 992 (7th Cir. 1979) *citing Blonder-Tongue Laboratories, Inc. v. Univ. of Illinois Foundation*, 402 U.S. 313, 332-34 (1971). Whether a prior action afforded a party a full and fair opportunity to litigate depends upon several factors, including who chose the forum, the incentive to litigate, whether the prior court understood the issues and whether the party was deprived of crucial evidence or witnesses. *Id.* "[I]n the end, decision will necessarily rest on the trial courts' sense of justice and equity." *Id.* at 992 (quoting *Blonder-Tongue*, 402 U.S. at 334).

For example, in *Miller Brewing Co.*, plaintiff Miller Brewing brought suit against Schlitz Brewing alleging violation of its trademark "LITE" for beer. *Id.* at 991. While the *Schlitz* suit was pending, Miller Brewing brought a second suit against G. Heileman Brewing alleging the same infringement. *Id.* Reversing a preliminary injunction in the *Heileman* litigation, the Seventh Circuit held that "because 'light' is a generic or common descriptive word when applied to beer, neither that word nor its phonetic equivalent may be appropriated as a trademark for beer." *Id.*

Following this ruling in the *Heileman* litigation, the court in the *Schlitz* litigation granted summary judgment against Miller Brewing under principles of collateral estoppel. *Id.* The Seventh Circuit affirmed the holding that Miller Brewing had a full and fair opportunity to litigate the validity of its trademark in *Heileman* and, thus, was bound by the determination as against Schlitz Brewing. It found that (1) Miller

Brewing chose the forum in the *Heileman* case; (2) Miller Brewing had the same incentive to litigate in *Heileman* as it did in *Schlitz;* (3) the controlling issue was simple; and (4) Miller Brewing was not deprived of crucial evidence or witnesses. *Id.* at 992-95.

Like *Miller Brewing Co.,* the plaintiffs in *Jones* had a full and fair opportunity to litigate and lost. They chose the forum. Since the *Jones* complaint and the instant Complaint both purport to represent a putative class, the same incentive to litigate the issues exists in both instances. Class certification is not a novel issue, but one that is quite familiar to courts. Finally, there is no indication that the *Jones* plaintiffs were deprived of any crucial evidence or witnesses. Rather, the issues relating to class certification and summary judgment were decided as a matter of law. Justice and equity prevent Plaintiffs and their counsel from presenting to this Court the identical issues that were fully litigated in *Jones.*

C. The Issues Decided in *Jones* Were Essential To a Final Judgment

For purposes of collateral estoppel, a "'final judgment' includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect." *Bridgestone,* 333 F.3d at 767. The factors relevant to "firmness" include whether a decision was "disavowedly tentative" or whether the parties were fully heard and the court supported its decision with a reasoned opinion reviewed on appeal. *Miller Brewing Co.,* 605 F.2d at 996.

For example, in *Bridgestone,* the Seventh Circuit previously ruled that plaintiffs' claims could not support a nationwide class and denied class certification. 333 F.3d at 767. In discussing the preclusive effect of that decision, the Seventh Circuit opined that its denial of class certification was "sufficiently firm" to support collateral estoppel. *Id.* The decision "was the result of focused attention by counsel in both the district court and [the Seventh Circuit]; both courts addressed the issue exhaustively in published opinions and brought the debate to a conclusion; certiorari was sought and denied." *Id.* The denial of class certification is a substantive issue, which "determines the identity of the parties and stakes of the case." *Id.* at 768.

In this case, just as in *Bridegestone,* the *Jones* decision concluding that class certification necessarily fails is sufficiently firm for collateral estoppel purposes. It was the result of focused attention by counsel and both the district court and the Seventh Circuit addressed the issue exhaustively in published decisions. *See Jones v. Takaki,* 832 F. Supp. 1224 (N.D. Ill.) and *Jones v. Takaki,* 38 F.3d 321 (7th Cir. 1994). The Seventh Circuit further denied the *Jones* plaintiffs petition for rehearing en banc. *Jones,* 38 F.3d at 321.

Similarly, the *Jones* court's conclusion that due process did not require a post-seizure probable cause hearing prior to the actual forfeiture trial was essential to its grant of summary judgment against the named plaintiffs and supports application of collateral estoppel. *Abbott Laboratories v. Impax Laboratories,* 2003 WL

1563426, *3 (March 26, 2003 N.D. Ill.) (finding the analysis used to grant summary judgment in a previous case formed the basis for collateral estoppel in a later case). In fact, the *Jones* plaintiffs conceded that, under the analysis applied by the Seventh Circuit, summary judgment was appropriate. *Jones*, 38 F.3d at 324-35.

D. Plaintiffs Were Fully Represented in *Jones*

Unnamed class members in a putative class have the status of parties for many purposes, including the determination of class certification. *Bridgestone*, 333 F.3d at 768. A decision, however, only binds absent class members who were adequately represented by the named litigants and class counsel. *Id.* ("Our suit, by contrast, was commenced as a class action, and one vital issue was litigated and resolved on a class-wide basis: whether a national class is tenable. Absent class members are bound provided that the named representatives and their lawyers furnished adequate representation, which they did.") (emphasis removed).

As a preliminary matter, the named Plaintiffs in this case were absent putative class members in *Jones*. The named plaintiffs in *Jones* each had cars seized by police officers in accordance with the Act. *Jones*, 38 F.3d at 322-23. They represented a putative class which included all persons "who have had, *or will in the future have*, vehicles, money or other property seized by police officers" and were not provided a post-seizure probable cause hearing. *Jones*, 38 F.3d at 323 (emphasis added). Plaintiffs in this case each allege that Chicago police

officers seized either a vehicle or money and that they have not received a post-seizure probable cause hearing. (Complaint ¶¶7, 22-30.) They seek to represent a class identical to the putative class in *Jones* – "persons who have had, or will have, property seized by Chicago police officers, provided the Defendants do not hold a prompt post-seizure probable cause to detain hearing." (Complaint ¶31.)

Plaintiffs, who are represented by the same attorney who represented the plaintiffs in *Jones*, are hard-pressed to argue lack of adequate representation. As absent members of the *Jones* putative class, Plaintiffs are bound by the denial of class certification and grant of summary judgment in that case. *See Bridgestone*, 333 F.3d at 769.

Based on the foregoing, collateral estoppel bars the Complaint and it should be dismissed, with prejudice.

II. PLAINTIFFS' CLAIMS ARE BARRED BY *STARE DECISIS*

Even if collateral estoppel did not bar Plaintiffs' claims, "[p]reclusion is not an all-or-nothing matter; there are degrees." *Premier Elec. Const. Co. v. Nat'l Elec. Contractors Association, Inc.*, 814 F.2d 358, 367 (7th Cir. 1987). "The doctrine of *stare decisis* supplies some of the lesser degrees." *Id.* Under *stare decisis*, "the decisions of a superior court in a unitary system bind inferior courts." *Colby v. J.C. Penny Co., Inc.*, 811 F.2d 1119, 1123 (7th Cir. 1987) (no stare decisis as

between district courts). Thus, courts in the Northern District of Illinois are bound by the "holding" of cases decided by the Seventh Circuit, which includes the facts, outcome and reasoning essential to the outcome. *See Tate v. Showboat Marina Casino Partnership,* 431 F.3d 580, 582 (7th Cir. 2005); *see also Pandya v. City of Chicago,* 1992 WL 198940, *5 FN 7 (Aug. 12, 1992, N.D. Ill.) ("The Seventh Circuit, within the limits of *stare decisis,* is free to modify its rulings. But, . . . until such time this court must follow the existing Seventh Circuit precedents.)

In *Tate,* the Seventh Circuit applied stare decisis where it found the case to be materially identical to the previous decision in *Harkins v. Riverboat Servs. Inc.,* 385 F.3d 1099 (7th Cir. 2005). *Id.* at 582. In *Harkins,* the court held that "members of the operating crew of a gambling boat that is most of the time moored rather than sailing are nevertheless 'seamen' within the meaning of the provision of the Fair Labor Standards Act that exempts seamen from the Act's overtime provisions." *Id.* at 581. The court reasoned that *stare decisis* prevented the plaintiffs' claims in *Tate* because they involved the same boat, the same job titles, an overlapping time period, and the same plaintiffs' lawyer. *Id.* at 582. The only material difference between the two cases was the identity of the plaintiffs. *Id.*

Unlike in *Tate,* here we have the same plaintiffs as in *Jones, see supra* Section I.D. In any case, even if the plaintiffs were not the same, as in *Tate,* the *stare decisis* effect of *Jones* prevents Plaintiffs' claims in the instant

case. Both *Jones* and the instant proceedings involve the same subject matter (the right to a post-seizure probable cause hearing following the seizure of vehicles or money by police in accordance with the Act), an overlapping time period (anyone who has or will have property seized) and the same plaintiffs' lawyer (Thomas Peters).

Further, Plaintiffs' counsel concedes that "*Jones* appears to be binding on this District." *(See* Response to Defendants' Motion to Reassign at ¶14, filed in *Gates v. Towey,* 04 C 2144, Docket No. 266, currently pending before Judge Castillo, a true and accurate copy of which is attached hereto as Exhibit A. ("Response").)

"The doctrine of *stare decisis* 'imparts authority to a decision . . . merely by virtue of the authority of the rendering court and independently of the quality of its reasoning." *Tate,* 431 F.3d at 582 (quoting *Midlock v. Apple Vacations West, Inc.,* 406 F.3d 453 (7th Cir. 2005)). "The essence of *stare decisis* is that the mere existence of certain decisions becomes a reason for adhering to their holdings in subsequent cases." *Id. Stare decisis* directs this Court to apply the Seventh Circuit's decision in *Jones* that (a) due process does not require a post-seizure probable cause hearing prior to the forfeiture hearing held in accordance with the Act; and (b) class certification of these claims necessarily fails for lack of typicality. *Jones,* 38 F.3d at 323. Accordingly, the Complaint should be dismissed, with prejudice.

III. THE ILLINOIS ATTORNEY GENERAL IS NOT A PARTY TO THE COMPLAINT, WHICH CHALLENGES THE CONSTITUTIONALITY OF A STATE STATUTE

Plaintiffs are challenging the constitutionality of the Act. (*See* Response at ¶13, Exhibit A.) They fail, however, to either name the Illinois Attorney General as a party or otherwise provide the Illinois Attorney General with notification of this action. *See* 28 U.S.C. § 2403; *Dynamics Corp. of America v. CTS Corp.*, 794 F.2d 250, 259 (7th Cir. 1986) (finding inadvertent violation of statute harmless given the rapid course of litigation in the district court and lack of prejudice) *rev'd on other grounds* 481 U.S. 69 (1987); *see also Merrill v. Town of Addison*, 763 F.2d 80, 82-83 (2d Cir. 1985) (state Attorney General should be notified that action has been filed in federal court challenging constitutionality of a state statute even if the claim is obviously frivolous and may be disposed of on other grounds). Accordingly, the Complaint should be dismissed as procedurally deficient.

Appendix F

CONCLUSION

For all of the foregoing reasons, the Class Action Complaint should be dismissed with prejudice.

Dated: February 16, 2007

Respectfully submitted,

CITY OF CHICAGO and
SUPERINTENDENT PHILIP J. CLINE

By: s/ Allan T. Slagel
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Appendix F

EXHIBIT A

IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 04 C 2155

Judge Ruben Castillo
Presiding

ELTON GATES and LUSTER NELSON,

Plaintiffs,

v.

OFFICER B. TOWERY, Star No. 8233,
OFFICER P. GALIARDO Star No. 19174, and
THE CITY OF CHICAGO,

Defendants.

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO REASSIGN

Plaintiffs through their attorneys, Thomas Peters, Kevin Peters, and Mary De Sloover, in response to the City's Motion to Reassign state as follows:

Appendix F

1. Plaintiffs do not object to the City's Motion To Reassign the *Kennedy* case and join in most of the argument made by the City with respect to the merits of reassignment of that case. However, the City's motion neglects to mention some reasons that support reassignment and other reasons that, in candor, do not support reassignment of the *Smith* case. With the hope of further elucidating the relevant issues, Plaintiffs submit the following points showing both the pros and the cons of reassignment.

2. In addition to the points made by the City, reassignment of *Kennedy* will avoid the possibility of inconsistent rulings on important issues of law and ultimately will expedite the final dispositions of all three cases.

3. For example, with respect to *Kennedy*, the City is urging Judge Darrah, to whom the case is currently assigned, to apply the rulings of this Honorable Court to bar the *Kennedy* plaintiffs' restitution claims. Because the City's arguments to Judge Darrah misrepresent this Honorable Court's rulings, the potential for inconsistent rulings is heightened.

4. As this Honorable Court no doubt recalls, the Court declined to certify the *Gates* restitution class on the grounds that Gates and Nelson lacked standing. As the Court saw it, the City tendered restitution before the *Gates* plaintiffs filed their motion to certify a restitution class. According to this Honorable Court, the City's tender mooted their personal claims and,

therefore, Gates and Nelson do not have standing to represent a restitution class.

5. If the same analysis is applied to the *Kennedy* plaintiffs, the conclusion must be that they have standing since the City has not tendered restitution to Fowler or Gonzalex (the Kennedy arrestees) but they have filed for class certification. Therefore, based on this Honorable Court's ruling in *Gates*, the *Kennedy* arrestees have standing to represent a restitution class. Once standing is established, the City has no other defense to certification of a restitution class. Since the merits of the restitution class were fully briefed before this Court in *Gates*, this Honorable Court is well-suited to resolve the issue without further briefing.

6. The same is true for the *Kennedy* due process class. This Honorable Court has ruled on a motion to dismiss and on class certification for a similar class in *Gates*. The only difference between those rulings and the issues in *Kennedy* is that the *Kennedy* due process class begins where the *Gates* class ends, on December 13, 2004. This Honorable Court has held that the City's alleged change in policy on December 13, 2004, makes Gates and Nelson, who were arrested before that date, unsuitable to represent a due process class beyond that date. Fowler and Gonzalez were arrested after December 13, 2004, and therefore are excluded from the *Gates* due process class, but Fowler and Gonzalez have standing to represent a post-December 13, 2004, due process class. That minor difference aside, all the other issues relating to the proposed due process class

in *Kennedy* are the same as issues this Honorable Court has resolved in *Gates*.

7. The *Kennedy* pensioners are a different story. They claim that the City is violating the Uniform Disposition of Unclaimed Property Act (765 ILCS 1025/1 et seq.) by not sending unclaimed funds to the state treasurer. That Act, as the Court knows, requires the City to transfer money that remains unclaimed for more than seven years. The City has never complied with the UDUPA and insists it does not have to comply based on the Law Enforcement Disposition of Unclaimed Property Act. See 765 ILCS 1030/1 et seq. So the issue is which act applies.

8. That is an issue this Honorable Court addressed when it ruled on Plaintiffs' Motion to Compel the City to Pay Publication Costs. (Doc. No. 85) In that motion, Plaintiffs maintained that, based on the UDUPA, any unclaimed money left with the Chicago Police Department is owned by the arrestees. The Act specifically assigns ownership to the person from whom the cash was originally seized but allows for the use of the cash, once it remains unclaimed for seven years, by the state pension funds. Given that understanding of the UDUPA, Plaintiffs maintained that ordering the City to pay publication costs was really just ordering the City to relinquish funds that belong to the class. The class was in effect paying with its own money, which the City was temporarily holding as a custodian.

9. The City countered Plaintiffs' argument by citing the LEDPA and a city ordinance. According to the City, those laws vested ownership of unclaimed funds in the City. The Court agreed with the *Gates* Plaintiffs and ordered the City to pay the publication costs. (Doc. No. 143) In that respect this Honorable Court has already evaluated the merits of the central issue in all of this litigation.

10. Precisely the same arguments are at issue with respect to the merits of the *Kennedy* pensioners' cause of action. The City, however, is trying to avoid another ruling on the merits of the UDUPA versus LEDPA controversy by challenging the standing of the *Kennedy* pensioners, and that issue is not directly related to any issue in *Gates.* Nonetheless, the benefits of reassignment of *Kennedy* far outweigh any inconveniences of reassignment because a ruling on the application of UDUPA or LEDPA is inevitable.

11. The *Kennedy* restitution claim, for example, hinges on who owns the unclaimed cash. If the arrestees retain ownership rights, as provided by the UDUPA, they are entitled to summary judgment on their restitution claim. The City cannot withhold money from the lawful owners. The same logic applies to the *Gates* conversion class. If the arrestees retain their ownership rights and demand return of their money, the City must relinquish the cash. On the other hand, if the City becomes the owner of unclaimed cash by virtue of the LEDPA or the ordinance, then the *Kennedy* plaintiffs are not entitled to restitution and the *Gates* conversion

class is also doomed. Either way, these claims are susceptible of resolution on summary judgment based on the application of the UDUPA or the LEDPA.

12. Furthermore, the *Kennedy* plaintiffs (Fowler and Gonzalez) have standing to assert the restitution claim that Gates and Nelson could not bring. And the City cannot seriously dispute the merits of a restitution class in *Kennedy* so a restitution class should be certified. By allowing reassignment and following the logic of this Honorable Court's prior rulings, once the Court certifies a restitution class in *Kennedy* one issue of law (UDUPA versus LEDPA) will resolve summary judgment.

13. *Smith* is far more problematic. The issues in *Smith* have nothing to do with the issues in *Kennedy* and *Gates*. The plaintiffs in *Smith* maintain they are entitled to a post-deprivation hearing between the seizure of their property and their forefeiture trials. Illinois law does not provide for such an intermediate hearing so the *Smith* plaintiffs are challenging the constitutionality of the Illinois forfeiture law. They do not claim they are entitled to restitution or damages. Nor are they challenging the adequacy of the notice provided by the City's inventory receipts or the City's policies with respect to Form 54. In that respect, reassignment is not warranted.

14. What the City wants the Court to know is that Thomas Peters previously handled the case of *Jones v. Takaki*, 38 F.3d 321 (7th Cir. 1994), where the Seventh

Circuit rejected a very similar challenge to the state's forfeiture system. Thomas Peters acknowledges his participation as lead counsel in *Jones* and he agrees that *Jones* appears to be binding in this District. However, Thomas Peters has a good faith basis for the *Smith* case.

15. Other than in *Jones*, neither the Seventh Circuit nor any other circuit court has applied a *Barker v. Wingo*, 407 U.S. 514 (1972) speedy trial analysis to a case seeking an intermediate post-deprivation hearing. *Jones* is an anomaly. Of greater importance, the Second Circuit has on three separate occasions, and as recently as September, 2006, held that *Mathews v. Eldridge*, 424 U.S. 319 (1976) is the standard by which the due process issue in *Smith* must be resolved. See *Krimstock v. Kelly*, 464 F.3d 246 (2nd Cir. 2006); *Jones v. Kelly*, 378 F.3d 198 (2nd Cir. 2004); and *Krimstock v. Kelly*, 306 F.3d 40 (2nd Cir. 2002). Each of the Second Circuit's opinions adopts the very same arguments the *Jones* plaintiffs made without success to the Seventh Circuit. There is, therefore, a split among the circuits, which the *Smith* plaintiffs have every right to pursue.

16. The only real benefit to reassignment of *Smith* is one the rules do not expressly incorporate. It will be easy to dispose of *Smith* by relying on *Jones*. Ease of disposition, however, is not grounds for reassignment. Therefore, Plaintiffs' opinion on the matter seems irrelevant. They do not oppose reassignment of *Smith* but the case does not fit the criteria for relatedness.

Appendix F

Wherefore, Plaintiffs join in the motion to reassign the *Kennedy* case.

Respectfully submitted,

s/ Thomas Peters
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APPENDIX G — DEFENDANT RICHARD A. DEVINE'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT FILED FEBRUARY 20, 2007

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

No. 06 C 6423

Judge Elaine Bucklo

Magistrate Judge Cole

CHERMANE SMITH, et al.,

Plaintiffs,

v.

CITY OF CHICAGO, et al.

Defendants.

DEFENDANT RICHARD A. DEVINE'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT

Defendant RICHARD A. DEVINE, State's Attorney of Cook County ("State's Attorney Devine"), through his Assistants, PATRICK T. DRISCOLL, JR., Deputy State's Attorney and LOUIS R. HEGEMAN and JOHN HEIL JR., Assistant State's Attorneys, submits this motion to dismiss the Plaintiff's Complaint,

pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, and in support hereof states the following:

1. Counsel for Plaintiffs previously fully litigated the exact issue at hand in *Jones v. Takaki*, 38 F.3d 321 (7th Cir. 1994). Plaintiffs in the present matter were part of the putative class presented in *Jones*. Consequently, the doctrine of collateral estoppel bars Plaintiffs' suit on its face.

2. The doctrine of *stare decisis* dictates that this Court follow the holding of the 7th Circuit in *Jones*, which denied the plaintiffs' request for class certification and found that the Drug Asset Forfeiture Procedure Act (the "Act") does not violate the due process rights of those whose property is seized pursuant to its provisions.

3. Plaintiff's apparent failure to notify, or name as a party, the Illinois Attorney General, violates the requirements of 28 U.S.C. § 2403(b).

WHEREFORE, on the basis of the above, as well as the attached Memorandum of Law in Support of his Motion, Defendant Richard A. Devine respectfully requests that this Honorable Court dismiss Plaintiffs' Complaint with prejudice.

Respectfully submitted,

RICHARD A. DEVINE
State's Attorney of Cook County

By: /s/ John Heil Jr.
One of his Attorneys

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Deputy State's Attorney
Chief, Civil Actions Bureau
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APPENDIX H — DEFENDANT RICHARD A. DEVINE'S MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION TO DISMISS PLAINTIFF'S COMPLAINT FILED FEBRUARY 20, 2007

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

No. 06 C 6423

Judge Elaine Bucklo

Magistrate Judge Cole

CHERMANE SMITH, et al.,

Plaintiffs,

v.

CITY OF CHICAGO, et al.

Defendants.

DEFENDANT RICHARD A. DEVINE'S MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION TO DISMISS PLAINTIFF'S COMPLAINT

Defendant RICHARD A. DEVINE, State's Attorney of Cook County ("State's Attorney Devine"), through his Assistants, PATRICK T. DRISCOLL, JR., Deputy State's Attorney and LOUIS R. HEGEMAN and JOHN HEIL JR., Assistant State's Attorneys,

submits this memorandum in support of his motion to dismiss the Plaintiff's Complaint, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

INTRODUCTION

Plaintiffs bring their Complaint, pursuant to 42 U.S.C. § 1983, on behalf of a putative class of individuals who have had, or will have, their property seized by the Chicago Police Department in accordance with the Drug Asset Forfeiture Procedure Act (the "Act"), 725 ILCS 150/1 *et seq.* Plaintiffs claim that the Act violates their due process rights because it does not provide a "prompt post-seizure determination of probable cause" to individuals whose property is seized pursuant to its provisions. (Complaint, ¶ 33).

Plaintiffs name State's Attorney Devine in his official capacity because the Cook County State's Attorney's Office reviews the forfeiture recommendations of the Chicago Police Department (Complaint, ¶ 15) and can elect to initiate formal forfeiture proceedings in accordance with the Act. (Complaint, ¶ 17-19). State's Attorney Devine, Plaintiffs claim, established and implemented a policy of "refus[ing] to return . . . seized property upon demand" during the 45 day review period afforded by the Act. (Complaint, ¶¶ 6, 15-16). Plaintiffs acknowledge that State's Attorney Devine and co-defendants City of Chicago and Superintendent Philip J. Cline apply and enforce the Act as it is written. (Complaint, ¶ 21).

Appendix H

The exact issue presented to this Court was already fully litigated by counsel for Plaintiffs in the 1994 case of *Jones v. Takaki*, 38 F.3d 321 (7th Cir. 1994). In *Jones*, the Seventh Circuit affirmed the ruling of Judge Marvin E. Aspen and refused to grant class certification. The court ruled that, in light of *United States v. $ 8,850*, 461 U.S. 555, 103 S. Ct. 2005 (1983), *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182 (1972), and *United States v. Von Neumann*, 474 U.S. 242, 106 S. Ct. 610 (1986), there existed no due process violation. *Jones*, 38 F.3d at 323-24.

Plaintiffs request that this Court a) certify their suit as a class action; b) declare that Plaintiffs have a due process right to a prompt post-seizure probable cause hearing; c) declare that the Defendants must hold a post-seizure probable cause hearing with ten business days of any seizure; and d) enjoin Defendants' supposed policy and practice of seizing and retaining custody of property for months without a judicial determination of probable cause. (Complaint, p. 7, Prayer for Relief).

Plaintiffs' complaint is identical in every respect to counsel's previous suit in *Jones*. Consequently, the complaint must be dismissed on its face for three reasons. First, Plaintiffs are collaterally estopped from bringing this suit because they are among the putative class of plaintiffs who previously fully litigated this same claim in *Jones*. Second, *stare decisis* requires that this Court apply the 7th Circuit's ruling in *Jones* that (a) due process does not require a post-seizure probable cause determination prior to the forfeiture hearing mandated by the Act; and (b) class certification must fail due to a

lack of typicality. Finally, Plaintiffs' failure to provide the Illinois Attorney General with notice of this action as required by 28 U.S.C. § 2403(b) should result in its dismissal on procedural grounds.

ARGUMENT

In the interest of judicial economy, State's Attorney Devine adopts and fully incorporates herein the arguments presented by Defendants City of Chicago and Superintendent Philip J. Cline in their Memorandum of Law in Support of their Motion to Dismiss, which was filed with this Honorable Court on February 16, 2007.

CONCLUSION

For the foregoing reasons, Plaintiffs' complaint should be dismissed with prejudice.

Respectfully submitted,

RICHARD A. DEVINE
State's Attorney of Cook County

By: /s/ John Heil Jr.
One of his Attorneys

Appendix H

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APPENDIX I — PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS FILED FEBRUARY 21, 2007

IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

No. 06 C 6423

HONORABLE JUDGE
BUCKLO, PRESIDING

CHERMANE SMITH, EDMANUEL PEREZ, TYHESHA BRUNSTON, MICHELLE WALDO KIRK YUNKER, and TONY WILLIAMS,

Plaintiffs,

v.

CITY OF CHICAGO, PHILIP J. CLINE, SUPERINTENDENT of POLICE and RICHARD DEVINE, COOK COUNTY STATES ATTORNEY

Defendants.

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS

Plaintiffs through their attorneys, Thomas Peters and Kevin Peters, respond to the Motion to Dismiss filed by the City of Chicago and Defendant Cline as follows:

Appendix 1

1. Plaintiffs agree the case of *Jones v. Takaki*, 38 F.3d 321 (7th Cir. 1994) is the governing precedent in this District and that *Jones* cannot be distinguished in any meaningful way from Plaintiffs' case.

2. Plaintiffs do not agree that *Jones* estops these Plaintiffs since no class was certified in *Jones*. However, the holding in *Jones* must be followed by this Honorable Court.

3. Plaintiffs also do not agree that 28 U.S.C. 2403 applies. The remedy Plaintiffs seek is not precluded by the state forfeiture law. The requested remedy is in addition to that already provided by state law. However, if the Court believes it is necessary to notify the Attorney General of the State of Illinois, Plaintiffs do not object.

4. Plaintiffs have a good faith belief that *Jones* is in conflict with holdings in *United States v. James Daniel Good Realty*, 510 U.S. 43, 126 L.Ed.2d 490 (1993); and *Krimstock v. Kelly*, 464 F.3d 246 (2nd Cir. 2006) but Plaintiffs recognize that the Court is currently bound by *Jones*.

Respectfully submitted,

S/ Thomas Peters
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PETITIONER'S BRIEF

Supreme Court, U.S.
FILED
MAY 11 2009
OFFICE OF THE CLERK

No. 08-351

IN THE

Supreme Court of the United States

ANITA ALVAREZ,
State's Attorney of Cook County, Illinois,

Petitioner,

v.

CHERMANE SMITH, EDMANUEL PEREZ, TYHESHA BRUNSTON, MICHELLE WALDO, KIRK YUNKER and TONY WILLIAMS,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF PETITIONER

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QUESTION PRESENTED

In determining whether the Due Process Clause requires a State or local government to provide a post-seizure probable cause hearing prior to a statutory judicial forfeiture proceeding and, if so, when such a hearing must take place, should district courts apply the "speedy trial" test employed in *United States v. $8,850*, 461 U.S. 555 (1983) and *Barker v. Wingo*, 407 U.S. 514 (1972) or the three-part due process analysis set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976)?

LIST OF PARTIES

The parties to the proceeding below were defendant Richard A. Devine, in his official capacity as the former State's Attorney of Cook County, Illinois ("former State's Attorney Devine"), defendants City of Chicago, Philip J. Cline, Superintendent of Police (the "City Defendants")[1] (collectively "Defendants") and plaintiffs/respondents Chermane Smith, Edmanuel Perez, Tyhesha Brunston, Michelle Waldo, Kirk Yunker and Tony Williams ("Respondents"). Mr. Devine was the State's Attorney of Cook County, Illinois until he was succeeded in office by Anita Alvarez on December 1, 2008. Ms. Alvarez is the current State's Attorney of Cook County and is the petitioner in this appeal.

---

1. On April 24, 2009, counsel for the City Defendants sent a letter to the Clerk of the Supreme Court notifying the Court that the City Defendants adopt and support the position of the Petitioner in this case. The City Defendants also noted that Jody P. Weis has succeeded Philip J. Cline as Superintendent of the Chicago Police department and, under Supreme Court Rule 35.3, is automatically substituted for Mr. Cline as a party.

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TABLE OF CITED AUTHORITIES

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CASES

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Mathews v. Eldridge,
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Smith v. City of Chicago,
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OPINIONS BELOW

The United States Court of Appeals for the Seventh Circuit reversed the decision of the United States District Court for the Northern District of Illinois granting Defendants' motions to dismiss. The Seventh Circuit's opinion is reported at 524 F.3d 834 (7th Cir. 2008) and is reprinted in Petitioner's Appendix at 1a. The district court's order granting former State's Attorney Devine's motion to dismiss is unpublished and is reprinted in Petitioner's Appendix at 12a.

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Seventh Circuit from which Petitioner Anita Alvarez, State's Attorney of Cook County ("Petitioner") seeks review was issued on May 2, 2008. (Pet. App. at 1a.) On July 3, 2008, the United States Court of Appeals for the Seventh Circuit granted Petitioner's motion to recall the case and stay the issuance of the mandate pending the filing of the subject petition in this Court. (Joint App. at 14a.)

The petition for writ of *certiorari* was filed on September 15, 2008. This Court granted the petition on February 23, 2009. Jurisdiction in this Court exists under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

725 ILCS 5/108-11 (2009)

> Disposition of things seized. The court before which the instruments, articles or things are returned shall enter an order providing for their custody pending further proceedings.

725 ILCS 5/108-12 (2009)

> Disposition of obscene material. In the case of any material seized which is alleged to have been possessed or used or intended to be used contrary to, or is evidence of a violation of, Section 11-20 of the "Criminal Code of 1961", approved July 28, 1961, as heretofore and hereafter amended [720 ILCS 5/11-20], the court before which the material is returned shall, upon written request of any person from whom the material was seized or any person claiming ownership or other right to possession of such material, enter an order providing for a hearing to determine the obscene nature thereof not more than 10 days after such return. If the material is determined to be obscene it shall be held pending further proceedings as provided by Section 108-11 of this Code [725 ILCS 5/108-11]. If the material is determined not to be obscene it shall be returned to the person from whom or place from which it was seized, or to the person claiming ownership or other right to possession of such material; provided

that enough of the record material may be retained by the State for purposes of appellate proceedings. The decision of the court upon this hearing shall not be admissible as evidence in any other proceeding nor shall it be *res judicata* of any question in any other proceeding.

725 ILCS 5/114-12 (2009)

Motion to Suppress Evidence Illegally Seized. (a) A defendant aggrieved by an unlawful search and seizure may move the court for the return of property and to suppress as evidence anything so obtained on the ground that:

(1) The search and seizure without a warrant was illegal; or

(2) The search and seizure with a warrant was illegal because the warrant is insufficient on its face; the evidence seized is not that described in the warrant; there was not probable cause for the issuance of the warrant; or, the warrant was illegally executed.

(b) The motion shall be in writing and state facts showing wherein the search and seizure were unlawful. The judge shall receive evidence on any issue of fact necessary to determine the motion and the burden of proving that the search and seizure were unlawful shall be on the defendant. If the

motion is granted the property shall be restored, unless otherwise subject to lawful detention, and it shall not be admissible in evidence against the movant at any trial.

(1) If a defendant seeks to suppress evidence because of the conduct of a peace officer in obtaining the evidence, the State may urge that the peace officer's conduct was taken in a reasonable and objective good faith belief that the conduct was proper and that the evidence discovered should not be suppressed if otherwise admissible. The court shall not suppress evidence which is otherwise admissible in a criminal proceeding if the court determines that the evidence was seized by a peace officer who acted in good faith.

(2) "Good faith" means whenever a peace officer obtains evidence:

(i) pursuant to a search or an arrest warrant obtained from a neutral and detached judge, which warrant is free from obvious defects other than non-deliberate errors in preparation and contains no material misrepresentation by any agent of the State, and the officer reasonably believed the warrant to be valid; or

(ii) pursuant to a warrantless search incident to an arrest for violation of a statute or local ordinance which is later declared unconstitutional or otherwise invalidated.

(3) This amendatory Act of 1987 shall not be construed to limit the enforcement of any appropriate civil remedy or criminal sanction in actions pursuant to other provisions of law against any individual or government entity found to have conducted an unreasonable search or seizure.

(4) This amendatory Act of 1987 does not apply to unlawful electronic eavesdropping or wiretapping.

(c) The motion shall be made before trial unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion. If the motion is made during trial, and the court determines that the motion is not untimely, and the court conducts a hearing on the merits and enters an order suppressing the evidence, the court shall terminate the trial with respect to every defendant who was a party to the hearing and who was within the scope of the order of suppression, without further proceedings, unless the State files a written notice that there will be no interlocutory appeal from such order of suppression. In the event of such termination, the court shall proceed with the trial of other defendants not thus affected. Such termination of trial shall be proper and shall not bar subsequent prosecution of the identical charges and defendants; however, if after such termination the State fails to prosecute the interlocutory appeal until a

determination of the merits of the appeal by the reviewing court, the termination shall be improper within the meaning of subparagraph (a) (3) of Section 3-4 of the "Criminal Code of 1961", approved July 28, 1961, as amended [720 ILCS 5/3-4], and subsequent prosecution of such defendants upon such charges shall be barred.

(d) The motion shall be made only before a court with jurisdiction to try the offense.

(e) The order or judgment granting or denying the motion shall state the findings of facts and conclusions of law upon which the order or judgment is based.

725 ILCS 150/2 (2009)

Legislative Declaration. The General Assembly finds that the civil forfeiture of property which is used or intended to be used in, is attributable to or facilitates the manufacture, sale, transportation, distribution, possession or use of substances in certain violations of the Illinois Controlled Substances Act [720 ILCS 570/100 *et seq.*], the Cannabis Control Act [720 ILCS 550/1 *et seq.*], or the Methamphetamine Control and Community Protection Act [720 ILCS 646/1 *et seq.*] will have a significant beneficial effect in deterring the rising incidence of the abuse and trafficking of such substances within this State. While forfeiture may secure for State and local units of government some resources for

deterring drug abuse and drug trafficking, forfeiture is not intended to be an alternative means of funding the administration of criminal justice. The General Assembly further finds that the federal narcotics civil forfeiture statute upon which this Act is based has been very successful in deterring the use and distribution of controlled substances within this State and throughout the country. It is therefore the intent of the General Assembly that the forfeiture provisions of this Act be construed in light of the federal forfeiture provisions contained in 21 U.S.C. 881 as interpreted by the federal courts, except to the extent that the provisions of this Act expressly differ therefrom.

725 ILCS 150/5 (2009)

Notice to State's Attorney. The law enforcement agency seizing property for forfeiture under the Illinois Controlled Substances Act [720 ILCS 570/100 *et seq.*], the Cannabis Control Act [720 ILCS 550/1 *et seq.*], or the Methamphetamine Control and Community Protection Act [720 ILCS 646/1 *et seq.*] shall, within 52 days of seizure, notify the State's Attorney for the county in which an act or omission giving rise to the forfeiture occurred or in which the property was seized of the seizure of the property and the facts and circumstances giving rise to the seizure and shall provide the State's Attorney with the inventory of the property and its

estimated value. When the property seized for forfeiture is a vehicle, the law enforcement agency seizing the property shall immediately notify the Secretary of State that forfeiture proceedings are pending regarding such vehicle.

725 ILCS 150/6 (2009)

Non-Judicial Forfeiture. If non-real property that exceeds $ 20,000 in value excluding the value of any conveyance, or if real property is seized under the provisions of the Illinois Controlled Substances Act [720 ILCS 570/100 *et seq.*], the Cannabis Control Act [720 ILCS 550/1 *et seq.*], or the Methamphetamine Control and Community Protection Act [720 ILCS 646/1 *et seq.*], the State's Attorney shall institute judicial *in rem* forfeiture proceedings as described in Section 9 of this Act [725 ILCS 150/9] within 45 days from receipt of notice of seizure from the seizing agency under Section 5 of this Act [725 ILCS 150/5]. However, if non-real property that does not exceed $ 20,000 in value excluding the value of any conveyance is seized, the following procedure shall be used:

(A) If, after review of the facts surrounding the seizure, the State's Attorney is of the opinion that the seized property is subject to forfeiture, then within 45 days of the receipt of notice of seizure from the seizing agency, the State's Attorney shall cause notice of

pending forfeiture to be given to the owner of the property and all known interest holders of the property in accordance with Section 4 of this Act [725 ILCS 150/4].

(B) The notice of pending forfeiture must include a description of the property, the estimated value of the property, the date and place of seizure, the conduct giving rise to forfeiture or the violation of law alleged, and a summary of procedures and procedural rights applicable to the forfeiture action.

(C)(1) Any person claiming an interest in property which is the subject of notice under subsection (A) of Section 6 of this Act [725 ILCS 150/6] may, within 45 days after the effective date of notice as described in Section 4 of this Act [725 ILCS 150/4], file a verified claim with the State's Attorney expressing his or her interest in the property. The claim must set forth:

(i) the caption of the proceedings as set forth on the notice of pending forfeiture and the name of the claimant;

(ii) the address at which the claimant will accept mail;

(iii) the nature and extent of the claimant's interest in the property;

(iv) the date, identity of the transferor, and circumstances of the claimant's acquisition of the interest in the property;

(v) the name and address of all other persons known to have an interest in the property;

(vi) the specific provision of law relied on in asserting the property is not subject to forfeiture;

(vii) all essential facts supporting each assertion; and

(viii) the relief sought.

(2) If a claimant files the claim and deposits with the State's Attorney a cost bond, in the form of a cashier's check payable to the clerk of the court, in the sum of 10 percent of the reasonable value of the property as alleged by the State's Attorney or the sum of $ 100, whichever is greater, upon condition that, in the case of forfeiture, the claimant must pay all costs and expenses of forfeiture proceedings, then the State's Attorney shall institute judicial *in rem* forfeiture proceedings and deposit the cost bond with the clerk of the court as described in Section 9 of this Act [725 ILCS 150/9] within 45 days after receipt of the claim and cost bond. In lieu of a cost bond, a person claiming interest in the seized property may file, under penalty of perjury, an indigency affidavit.

(3) If none of the seized property is forfeited in the judicial *in rem* proceeding, the clerk of the court shall return to the claimant, unless the court orders otherwise, 90% of the sum which has been deposited and shall retain as costs 10% of the money deposited. If any of the seized property is forfeited under the judicial forfeiture proceeding, the clerk of the court shall transfer 90% of the sum which has been deposited to the State's Attorney prosecuting the civil forfeiture to be applied to the costs of prosecution and the clerk shall retain as costs 10% of the sum deposited.

(D) If no claim is filed or bond given within the 45 day period as described in subsection (C) of Section 6 of this Act [725 ILCS 150/6], the State's Attorney shall declare the property forfeited and shall promptly notify the owner and all known interest holders of the property and the Director of the Illinois Department of State Police of the declaration of forfeiture and the Director shall dispose of the property in accordance with law.

725 ILCS 150/8 (2009)

Exemptions from forfeiture. A property interest is exempt from forfeiture under this Section if its owner or interest holder establishes by a preponderance of evidence that the owner or interest holder:

(A)(i) in the case of personal property, is not legally accountable for the conduct giving rise to the forfeiture, did not acquiesce in it, and did not know and could not reasonably have known of the conduct or that the conduct was likely to occur, or

(ii) in the case of real property, is not legally accountable for the conduct giving rise to the forfeiture, or did not solicit, conspire, or attempt to commit the conduct giving rise to the forfeiture; and

(B) had not acquired and did not stand to acquire substantial proceeds from the conduct giving rise to its forfeiture other than as an interest holder in an arms length commercial transaction; and

(C) with respect to conveyances, did not hold the property jointly or in common with a person whose conduct gave rise to the forfeiture; and

(D) does not hold the property for the benefit of or as nominee for any person whose conduct gave rise to its forfeiture, and, if the owner or interest holder acquired the interest through any such person, the owner or interest holder acquired it as a bona fide purchaser for value without knowingly taking part in the conduct giving rise to the forfeiture; and

(E) that the owner or interest holder acquired the interest:

(i) before the commencement of the conduct giving rise to its forfeiture and the person whose conduct gave rise to its forfeiture did not have the authority to convey the interest to a bona fide purchaser for value at the time of the conduct; or

(ii) after the commencement of the conduct giving rise to its forfeiture, and the owner or interest holder acquired the interest as a mortgagee, secured creditor, lienholder, or bona fide purchaser for value without knowledge of the conduct which gave rise to the forfeiture; and

(a) in the case of personal property, without knowledge of the seizure of the property for forfeiture; or

(b) in the case of real estate, before the filing in the office of the Recorder of Deeds of the county in which the real estate is located of a notice of seizure for forfeiture or a lis pendens notice.

725 ILCS 150/9 (2009)

Judicial *in rem* procedures. If property seized under the provisions of the Illinois Controlled Substances Act [720 ILCS 570/100 et seq.], the Cannabis Control Act [720 ILCS 550/1

et seq.], or the Methamphetamine Control and Community Protection Act [720 ILCS 646/1 *et seq.*] is non-real property that exceeds $ 20,000 in value excluding the value of any conveyance, or is real property, or a claimant has filed a claim and a cost bond under subsection (C) of Section 6 of this Act [725 ILCS 150/6], the following judicial *in rem* procedures shall apply:

(A) If, after a review of the facts surrounding the seizure, the State's Attorney is of the opinion that the seized property is subject to forfeiture, then within 45 days of the receipt of notice of seizure by the seizing agency or the filing of the claim and cost bond, whichever is later, the State's Attorney shall institute judicial forfeiture proceedings by filing a verified complaint for forfeiture and, if the claimant has filed a claim and cost bond, by depositing the cost bond with the clerk of the court. When authorized by law, a forfeiture must be ordered by a court on an action *in rem* brought by a State's Attorney under a verified complaint for forfeiture.

(B) During the probable cause portion of the judicial *in rem* proceeding wherein the State presents its case-in-chief, the court must receive and consider, among other things, all relevant hearsay evidence and information. The laws of evidence relating to civil actions shall apply to all other portions of the judicial *in rem* proceeding.

(C) Only an owner of or interest holder in the property may file an answer asserting a claim against the property in the action *in rem*. For purposes of this Section, the owner or interest holder shall be referred to as claimant.

(D) The answer must be signed by the owner or interest holder under penalty of perjury and must set forth:

(i) the caption of the proceedings as set forth on the notice of pending forfeiture and the name of the claimant;

(ii) the address at which the claimant will accept mail;

(iii) the nature and extent of the claimant's interest in the property;

(iv) the date, identity of transferor, and circumstances of the claimant's acquisition of the interest in the property;

(v) the name and address of all other persons known to have an interest in the property;

(vi) the specific provisions of Section 8 of this Act [725 ILCS 150/8] relied on in asserting it is not subject to forfeiture;

(vii) all essential facts supporting each assertion; and

(viii) the precise relief sought.

(E) The answer must be filed with the court within 45 days after service of the civil *in rem* complaint.

(F) The hearing must be held within 60 days after filing of the answer unless continued for good cause.

(G) The State shall show the existence of probable cause for forfeiture of the property. If the State shows probable cause, the claimant has the burden of showing by a preponderance of the evidence that the claimant's interest in the property is not subject to forfeiture.

(H) If the State does not show existence of probable cause or a claimant has established by a preponderance of evidence that the claimant has an interest that is exempt under Section 8 of this Act [725 ILCS 150/8], the court shall order the interest in the property returned or conveyed to the claimant and shall order all other property forfeited to the State. If the State does show existence of probable cause and the claimant does not establish by a preponderance of evidence that the claimant has an interest that is exempt under Section 8 of this Act [725 ILCS 150/8], the court shall order all property forfeited to the State.

(I) A defendant convicted in any criminal proceeding is precluded from later denying the essential allegations of the criminal offense

of which the defendant was convicted in any proceeding under this Act regardless of the pendency of an appeal from that conviction. However, evidence of the pendency of an appeal is admissible.

(J) An acquittal or dismissal in a criminal proceeding shall not preclude civil proceedings under this Act; however, for good cause shown, on a motion by the State's Attorney, the court may stay civil forfeiture proceedings during the criminal trial for a related criminal indictment or information alleging a violation of the Illinois Controlled Substances Act [720 ILCS 570/100 *et seq.*], the Cannabis Control Act [720 ILCS 550/1 *et seq.*], or the Methamphetamine Control and Community Protection Act [720 ILCS 646/1 *et seq.*]. Such a stay shall not be available pending an appeal. Property subject to forfeiture under the Illinois Controlled Substances Act [720 ILCS 570/100 *et seq.*], the Cannabis Control Act [720 ILCS 550/1 et seq.], or the Methamphetamine Control and Community Protection Act [720 ILCS 646/1 et seq.] shall not be subject to return or release by a court exercising jurisdiction over a criminal case involving the seizure of such property unless such return or release is consented to by the State's Attorney.

(K) All property declared forfeited under this Act vests in this State on the commission of the conduct giving rise to forfeiture together

with the proceeds of the property after that time. Any such property or proceeds subsequently transferred to any person remain subject to forfeiture and thereafter shall be ordered forfeited unless the transferee claims and establishes in a hearing under the provisions of this Act that the transferee's interest is exempt under Section 8 of this Act [725 ILCS 150/8].

(L) A civil action under this Act must be commenced within 5 years after the last conduct giving rise to forfeiture became known or should have become known or 5 years after the forfeitable property is discovered, whichever is later, excluding any time during which either the property or claimant is out of the State or in confinement or during which criminal proceedings relating to the same conduct are in progress.

765 ILCS 1030/1 (2009)

This Act is applicable to all personal property of which possession is transferred to a police department or other law enforcement agency of the State or a county, city, village or incorporated town, under circumstances supporting a reasonable belief that such property was abandoned, lost or stolen or otherwise illegally possessed, except property seized during a search, and retained and ultimately returned, destroyed or otherwise disposed of pursuant to order of a court in

accordance with Section 108-11, 108-12 or 114-12 of the "Code of Criminal Procedure of 1963" [725 ILCS 5/108-11, 725 ILCS 5/108-12, or 725 ILCS 5/114-12] or other law hereafter applicable to property thus retained, and except property of which custody and disposition is prescribed by Article II of Chapter 4 of The Illinois Vehicle Code [625 ILCS 5/4-201 *et seq.*].

765 ILCS 1030/2 (2009)

(a) Such property believed to be abandoned, lost or stolen or otherwise illegally possessed shall be retained in custody by the sheriff, chief of police or other principal official of the law enforcement agency, which shall make reasonable inquiry and efforts to identify and notify the owner or other person entitled to possession thereof, and shall return the property after such person provides reasonable and satisfactory proof of his ownership or right to possession and reimburses the agency for all reasonable expenses of such custody.

(b) Weapons that have been confiscated as a result of having been abandoned or illegally possessed may be transferred to the Department of State Police for use by the crime laboratory system, for training purposes, or for any other application as deemed appropriate by the Department, if no legitimate claim is made for the confiscated

> weapon within 6 months of the date of confiscation, or within 6 months of final court disposition if such confiscated weapon was used for evidentiary purposes.

765 ILCS 1030/5 (2009)

> The owner or other person entitled to possession of such property may claim and recover possession of the property at any time before its sale at public auction, upon providing reasonable and satisfactory proof of ownership or right to possession and reimbursing the law enforcement agency for all reasonable expenses of custody thereof.

STATEMENT OF THE CASE

I. Background.

Illinois' Drug Asset Forfeiture Procedure Act ("DAFPA" or the "Act") directs police departments to notify their jurisdiction's State's Attorney within 52 days of the seizure of any property pursuant to the Illinois Controlled Substances Act, 720 ILCS 570/100 (2009), or the Cannabis Control Act, 720 ILCS 550/1 (2009). *See generally* 725 ILCS 150/5 (2009).

Upon receiving notice from a police department, the State's Attorney has 45 days to elect whether to initiate civil forfeiture proceedings. *See* 725 ILCS 150/6(A) (2009). If an *in rem* forfeiture action is initiated, the State's Attorney must provide notice to the owner of the property and all known interest holders before the

45 days elapse. *Ibid.* As required by statute, the notice includes a description of the property, the estimated value of the property, the date and place of seizure, the conduct giving rise to forfeiture or the violation of law alleged, and a summary of procedures and procedural rights applicable to the forfeiture action.

Pursuant to the Act, owners of personal property not exceeding $20,000 in value who wish to contest forfeiture (like Respondents in this case) may file a verified claim and post a cost bond. Such action triggers a judicial proceeding in which the State must establish probable cause for forfeiture of the property. *See* 725 ILCS 150/6(C) (2009); 725 ILCS 150/9 (2009). Unless continued for good cause, this hearing must be convened within 60 days after the property owner files an answer to the complaint. 725 ILCS 150/9(F) (2009). One form of "good cause" that the Act recognizes is the pendency of related criminal charges. 725 ILCS 150/9(J) (2009).

Within this judicial hearing, property owners may assert an affirmative defense that the subject property is exempt from forfeiture. 725 ILCS 150/8 (2009). Under Section 8 of DAFPA, for example, an interest in personal property is exempt from forfeiture if the property owner or interest holder can establish by a preponderance of evidence that he or she "is not legally accountable for the conduct giving rise to the forfeiture, did not acquiesce in it, and did not know and could not reasonably have known of the conduct or that the conduct was likely to occur." 725 ILCS 150/8(A)(i) (2009).

Here, Respondents filed a complaint alleging that their respective due process rights were violated

because DAFPA itself did not mandate an immediate post-seizure probable cause hearing prior to the statutory judicial forfeiture proceeding. In this regard, Respondents' class action complaint asked the district court to declare that DAFPA was unconstitutional as applied to Respondents.

II. Proceedings Below.

On November 22, 2006, Respondents filed a class action complaint against former State's Attorney Devine and the City Defendants alleging a violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution and 42 U.S.C. Section 1983. (Joint App. at 30a.) Respondents also filed a motion for class certification. (Joint App. at 37a.) The jurisdiction of the district court was invoked under 28 U.S.C. §§ 1331 and 1343.

On February 16, 2007, the City Defendants filed a motion to dismiss Respondents' Class Action Complaint. (Joint App. at 41a and 43a.) On February 20, 2007, State's Attorney Devine also filed a motion to dismiss this complaint. (Joint App. at 66a and 69a.) In these motions to dismiss, Defendants argued that Respondents' proposed class action complaint should be dismissed based upon the Seventh Circuit's decision in *Jones v. Takaki*, 38 F.3d 321 (7th Cir. 1994).

In *Jones*, the Seventh Circuit held that under *United States v. $8,850*, 461 U.S. 555, 564 (1983), district courts should apply the speedy trial test from *Barker v. Wingo*, 407 U.S. 514 (1972), to determine whether the delay in the initiation of a civil forfeiture proceeding

violated due process. *Jones*, 38 F.3d at 324. The *Jones* plaintiffs argued that *$8,850* was distinguishable because it focused "on whether the length of delay in initiation of the actual forfeiture proceeding violates the requirements of due process." *Ibid.* In contrast, the *Jones* plaintiffs contended that due process required a preliminary determination of probable cause because the forfeiture proceeding would not occur for some time. *Ibid. Jones* concluded that under this Court's decision in *United States v. Von Neumann*, 474 U.S. 242 (1986), this argument was legally untenable. *Jones*, 38 F.3d at 324.

On February 21, 2007, Respondents filed a response to the motions to dismiss acknowledging that *Jones* was controlling precedent that defeated the claim. Respondents conceded that "*Jones* is the governing precedent in this District and that *Jones* cannot be distinguished in any meaningful way from Plaintiffs' case." (Joint App. at 75a.) Respondents argued that *Jones* conflicted with "*United States v. James Daniel Good Realty*, 510 U.S. 43 (1993) and *Krimstock v. Kelly*, 464 F.3d 246 (2nd Cir. 2006)" but "recognize[d] that the Court is currently bound by *Jones*." (Joint App. at 75a.)

On February 22, 2007, the district court granted defendants' motions to dismiss, specifically referring to Respondents' counsel's admission that the court was bound by *Jones*. (Pet. App. at 12a.) As the application of the *Barker* speedy trial test to determine whether any of the Respondents could establish a due process violation was highly individualized and not suitable for class treatment, the district court dismissed Respondents' motion for class certification as moot. (Pet. App. at 12a.)

On May 2, 2008, the Court of Appeals for the Seventh Circuit issued an opinion reversing the decision of the district court. *Smith v. City of Chicago*, 524 F.3d 834 (7th Cir. 2008); (Pet. App. at 1a).[2] The Seventh Circuit rejected its previous analysis in *Jones*, declined to follow *$8,850* and *Von Neumann* and instead applied the three-part due process test from *Mathews v. Eldridge*, 424 U.S. 319 (1976), to determine whether DAFPA violated due process. The Seventh Circuit held that DAFPA facially violated the Due Process Clause because it did not provide for an interim, adversarial hearing after the seizure of personal property but before the civil forfeiture hearing. (Pet. App. at 10a.) The Seventh Circuit stated that "some sort of mechanism to test the validity of the retention of the property is required." (Pet. App. at 10a.)

On May 16, 2008, former State's Attorney Devine filed a petition for rehearing. (Joint App. at 13a.) The Seventh Circuit denied this petition. (Joint App. at 13a.) Thereafter, the Seventh Circuit recalled the case and stayed issuance of the mandate pending this Court's disposition of the case. (Joint App. at 14a.)

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2. The Seventh Circuit noted that its decision "signal[ed] a reversal of course from *Jones*" and, thus, the opinion was circulated to the full court before release in accordance with Seventh Circuit Rule 40(e). (Petitioner's App. at 11a.)

SUMMARY OF THE ARGUMENT

The Seventh Circuit held that DAFPA violates the Due Process Clause of the Fourteenth Amendment because it fails to provide for a prompt, adversarial "postseizure/preforfeiture" hearing to test the validity of the seizure and provide for release on bond of the seized property. (Pet. App. at 1a-11a) Specifically, the circuit court indicated that because an "innocent owner can be without his car for months or years without a means to contest the seizure or even to post a bond to obtain its release" (Pet. App. at 8a), the Constitution required the creation of an entirely new proceeding: an interim adversarial hearing to be held within days of the seizure. As such, the court remanded the matter to the district court to "fashion appropriate procedural relief consistent with [its] opinion." (Pet. App. at 10a)

Nothing in the purpose of the Due Process Clause, the history of civil forfeiture in the United States or previous decisions from this Court compels this result. Accordingly, the Seventh Circuit's decision should be reversed as it is inconsistent with not only the common law origins of *in rem* forfeiture, but also this Court's well-established precedent that the judicial forfeiture hearing provides all the process that is due under the Constitution since its sole function is to determine whether there was probable cause for the seizure and whether the property should be returned to the owner. *See, e.g. Gelston v. Hoyt*, 16 U.S. (3 Wheat) 246, 318 (1818) ("Where property is seized and libelled as forfeited to the government, the sole object of the suit is to ascertain whether the seizure be rightful, and the forfeiture incurred or not."). For nearly 200 years, this Court has held that a separate proceeding to determine

the reasonableness of the seizure, prior to the forfeiture hearing itself, was unnecessary to protect the claimant's property interests. *See United States v. Von Neumann*, 474 U.S. 242, 249-51 (1986); *United States v. $8,850*, 461 U.S. 555, 564-69 (1983); *Gelston*, 16 U.S. (3 Wheat) at 312; *Slocum v. Mayberry*, 15 U.S. (2 Wheat) 1 (1817). The Seventh Circuit unjustifiably reported from this precedent.

The Seventh Circuit's requirement of an interim hearing was unnecessary for another reason: Illinois law, like federal law, already provides property owners with various mechanisms to petition the government for the return of wrongfully seized personal property. *See, e.g.*, 765 ILCS 1030/1 (2009); 765 ILCS 1030/5 (2009); 725 ILCS 5/108-11 (2009); 725 ILCS 114-12(a) (2009); *People v. Moore*, 410 Ill. 241, 251, 102 N.E.2d 146, 151 (1951) and *People v. Canady*, 49 Ill. 2d 416, 423, 275 N.E.2d 356, 360 (1971). As such, any harm an individual claimant suffers from a delay in instituting forfeiture proceedings can be ameliorated without declaring DAFPA unconstitutional on its face.

Because this Court explicitly held in *Von Neumann* and *$8,850* that any challenge to the length of the delay in commencing the forfeiture hearing should be analyzed under the four factor speedy-trial test of *Barker v. Wingo*, 407 U.S. 514 (1972), the Seventh Circuit also erred when it looked to this Court's decisions in *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993), and *Mathews v. Eldridge*, 424 U.S. 319 (1976), to support its decision that such an interim hearing was required. *Good* involved the question of whether notice of a pending forfeiture is required prior to the seizure of real property, a point thoroughly distinct from the instant case which only involves personal property (cars

and cash). While *Mathews* provides a framework for addressing procedural due process claims when little or no precedent exists addressing what process is due in a particular situation, the procedures applicable to *in rem* forfeiture proceedings are grounded in centuries of common law and constitutional tradition.

Moreover, once personal property is seized, the paramount due process concern is not the notice provided pre-seizure but rather the delay prior to the post-seizure hearing. *$8,850*, 461 U.S. at 562, 563 (noting that a "postseizure delay may become so prolonged that the dispossessed property owner has been deprived of a meaningful hearing at a meaningful time.") The *Barker* due process analysis specifically considers the length and reason of such a delay. The *Mathews* three-part due process test does not.

Significantly, the Seventh Circuit's requirement of an interim hearing does not come without a cost. The scheduling of such an interim hearing within days of seizure threatens the rights of innocent owners unaware of the seizure of their personal property and potentially forces the State to engage in an adversarial proceeding long before the police have had the opportunity to complete their investigation. Also, in both the interim hearing and the subsequent civil forfeiture hearing, the parties would have the same respective burdens of proof; *i.e.*, if the State meets its burden of establishing probable cause for the forfeiture, the burden shifts to the claimant to show by a preponderance of the evidence that the property is not subject to forfeiture. 725 ILCS 150/9(G).

The Due Process Clause does not mandate the type of interim, adversarial hearing contemplated by the lower court. Accordingly, and for the reasons set forth below, this Court should reverse the judgment of the Seventh Circuit.

ARGUMENT

The Seventh Circuit held that the Due Process Clause of the Fourteenth Amendment requires an interim "postseizure/preforfeiture" hearing to test the validity of the seizure and provide for release on bond of the seized property. (Pet. App. at 9a-10a.) Specifically, the court ruled that because DAFPA allows the seizing police agency up to 52 days to complete its investigation and notify the State's Attorney and then provides the State's Attorney an additional 45 days to either notify the owner or institute *in rem* forfeiture proceedings, the Act is unconstitutional because an "innocent owner can be without his car for months or years without a means to contest the seizure or even to post a bond to obtain its release." (Pet. App. at 8a.)[3]

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3. Although the statute authorizes up to 52 days for the police investigation and another 45 days for the State's Attorney's decision on whether to seek forfeiture, due to the unusual procedural posture of this case, Petitioner has not had the opportunity to demonstrate that in actual practice the time frame is considerably shorter. Moreover, although Respondents' complaint sets out an as-applied challenge to DAFPA, the Seventh Circuit erroneously treated it as a facial challenge when it reversed the district court and ordered it to "fashion appropriate procedural relief." (Pet. App. at 10a.)

This holding is, however, inconsistent with not only the common law origins of *in rem* forfeiture, but this Court's well-established precedent regarding both civil asset forfeiture and procedural due process as well. Rather, as the Court has long recognized, due process is a flexible concept which is guided by historical practice, and the mere fact that property rights are implicated does not require the creation of entirely new proceedings where the existing procedures already protect against arbitrary and capricious governmental action. Thus, contrary to the Seventh Circuit's conclusion, no interim "postseizure/preforfeiture" hearing is required. The forfeiture hearing itself not only ensures that probable cause existed for the seizure but also whether the submission of an "innocent owner" defense is sufficient to preclude forfeiture and require the return of the property.

I. The Seventh Circuit's Decision Is Contrary To The Common Law Origins Of Civil Forfeiture.

Civil asset forfeiture in the United States has its roots in early English common law. *See Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680-84 (1974). Specifically, three kinds of forfeiture were established in England at the time of the founding of the United States: deodand, forfeiture upon conviction for a felony or treason, and statutory forfeiture. *See Austin v. United States*, 509 U.S. 602, 613 (1993).

"At common law the value of an inanimate object directly or indirectly causing the accidental death of a King's subject was forfeited to the Crown as a deodand." *Calero-Toledo*, 416 U.S. at 680-81. Deodands have been

attributed to ancient biblical laws (*id.* at 681 n.17, *citing* Exodus 21:28 ("if an ox gore a man or a woman, and they die, he shall be stoned: and his flesh shall not be eaten")), and were premised upon the notion that the King would use the money for charitable uses, such as paying for Masses to be said for the good of the dead man's soul. *Calero-Toledo*, 416 U.S. at 681, *citing* 1 W. Blackstone, *Commentaries* *300. However, "the beneficiary of the deodand was never the kin of the dead victim, but the King, or the local lord or township designated as beneficiary in the Crown's name." J. Finkelstein, *The Goring Ox: Some Historical Perspectives On Deodands, Forfeitures, Wrongful Death and The Western Notion Of Sovereignty*, 46 TEMPLE L.Q. 169, 182 (1973).

The second kind of common-law forfeiture, known as forfeitures of estate, applied only to those who had been convicted of a felony or of treason. *Austin*, 509 U.S. at 611-12, *citing* 4 W. Blackstone, at *38. "The convicted felon forfeited his chattels to the Crown and his lands escheated to his lord; the convicted traitor forfeited all of his property, real and personal, to the Crown." *Calero-Toledo*, 416 U.S. at 682. *See also The Palmyra*, 25 U.S. (12 Wheat) 1, 14 (1827) ("at the common law, in many cases of felonies, the party forfeited his goods and chattels to the crown . . . [as] a consequence, of the judgment of conviction"). Such forfeitures were premised on the theory that "property was a right derived from society which one lost by violating society's laws." *Austin*, 509 U.S. at 612, *citing* 1 W. Blackstone, at *299, 382.

English statutes, such as the Navigation Acts of 1660, authorized forfeitures for violations of the customs and revenue laws. *Calero-Toledo*, 416 U.S. at 682. Violations of these statutes resulted in the forfeiture of the illegally carried goods as well as the instrumentalities that transported them. *Austin*, 509 U.S. at 612, *citing* L. Harper, *English Navigation Laws* (1939); *see also United States v. Bajakajian*, 524 U.S. 321, 333 n.8 (1998) (noting that an instrumentality was "historically . . . subject to forfeiture because it was the actual means by which an offense was committed"). Under these statutes, *in rem* proceedings for the forfeiture of items seized on land were conducted in the court of the Exchequer, while seizures on navigable waters led to *in rem* proceedings in the Admiralty courts. *C.J. Hendry Co. v. Moore*, 318 U.S. 133, 137 (1943).

Deodands did not become part of the common-law tradition of the United States (*Calero-Toledo*, 416 U.S. at 682), and the Constitution forbids forfeiture of estate as a punishment for treason "except during the Life of the Person attainted." U.S. Const., Art. III, § 3, cl. 2. The First Congress also abolished forfeiture of estate as a punishment for felons. Act of Apr. 30, 1790, ch. 9, § 24, 1 Stat. 117. However, "'long before the adoption of the Constitution the common law courts in the Colonies — and later in the states during the period of Confederation — were exercising jurisdiction *in rem* in the enforcement of [English and local] forfeiture statutes.'" *Calero-Toledo*, 416 U.S. at 683, *quoting C. J. Hendry Co*, 318 U.S. at 139. The theory behind such forfeitures was the fiction that the action was directed against the "guilty property," rather than against the offender himself. *See Various Items of Personal*

Property v. United States, 282 U.S. 577, 581 (1931) ("It is the property which is proceeded against, and, by resort to a legal fiction, held guilty and condemned as though it were conscious instead of inanimate and insentient."). In this regard, "there is some analogy to the law of deodand by which a personal chattel that was the immediate cause of the death of any reasonable creature was forfeited." *J. W. Goldsmith, Jr.-Grant Co. v. United States*, 254 U.S. 505, 511 (1921).

Following the ratification of the Constitution, the First Congress enacted legislation authorizing the seizure and forfeiture of ships and cargo involved in customs offenses. *United States v. 92 Buena Vista Ave.*, 507 U.S. 111, 119 (1993), *citing* §§ 12, 36, 1 Stat. 39, 47; §§ 13, 14, 22, 27, 67, 1 Stat. 157-159, 161, 163-164, 176. Congress subsequently authorized the seizure of ships engaged in piracy. *See The Palmyra*, 25 U.S. (12 Wheat) at 7, *citing* Act of Congress of the third of March, 1819, ch. 75. Since those modest beginnings, Congress and the States have enacted comprehensive laws authorizing civil forfeiture of both real and personal property involved in criminal offenses, such that "forfeiture statutes reach virtually any type of property that might be used in the conduct of a criminal enterprise." *Calero-Toledo*, 416 U.S. at 683. *See also, e.g., Dobbins's Distillery v. United States*, 96 U.S. 395, 400-401 (1878) (forfeiture of a distillery and associated real and personal property for unpaid alcohol taxes); *J.W. Goldsmith, Jr.-Grant Co. v. United States*, 254 U.S. 505, 510-512 (1921) (forfeiture of an automobile used to illegally transport alcohol); *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 237 (1972) (forfeiture of undeclared imported gems); *United States v. One*

Assortment of 89 Firearms, 465 U.S. 354, 364-366 (1984) (forfeiture of unlicensed firearms); *United States v. Thirty-seven Photographs*, 402 U.S. 363, 366-367 (1971) (forfeiture of obscene photographs).

This Court has long recognized that civil forfeiture is "not an additional penalty for the commission of a criminal act, but rather is a separate civil sanction, remedial in nature." *89 Firearms*, 465 U.S. at 366. Because the focus of the forfeiture proceeding is the object itself, separate criminal charges against the owner are not required. *Calero-Toledo*, 416 U.S. at 681-86; *The Palmyra*, 25 U.S. (12 Wheat) at 14-15. In fact, neither double jeopardy nor collateral estoppel precludes statutory *in rem* forfeiture proceedings after an individual has been acquitted in a criminal case. *89 Firearms*, 465 U.S. at 361.

Nevertheless, forfeiture statutes work in conjunction with the criminal provisions as the forfeiture of wrongfully-used property, such as conveyances like cars and boats, "fosters the purposes served by the underlying criminal statutes, both by preventing further illicit use of the [property] and by imposing an economic penalty, thereby rendering illegal behavior unprofitable." *Calero-Toledo*, 416 U.S. at 687; *see also 89 Firearms*, 465 U.S. at 364 (forfeiture of unlicensed firearms "discourag[es] unregulated commerce in firearms" and "remov[es] from circulation firearms that have been used or intended for use outside regulated channels of commerce"); *General Motors Acceptance Corporation v. United States*, 286 U.S. 49, 56 (1932) ("[f]orfeiture of vehicles . . . is one of the time-honored methods adopted by the Government for the repression of the crime of smuggling").

Because the government's right to the property vests "immediately upon the commission of the act" (*United States v. Stowell*, 133 U.S. 1, 16-17 (1890) ("the forfeiture constitutes a statutory transfer of the right to the United States at the time the offence is committed")), and because seizure of the property is a necessary prerequisite to the forfeiture proceedings (*The Brig Ann*, 13 U.S. (9 Cranch) 289, 291 (1815) (Story, J.) ("before judicial cognizance can attach upon a forfeiture *in rem*, under the statute, there must be a seizure")), such property may be seized without prior notice to the owner or first conducting a judicial hearing since it "could be removed to another jurisdiction, destroyed, or concealed, if advance warning of confiscation were given." *Calero-Toledo*, 416 U.S. at 679.

It is, therefore, clear that instrumentality forfeiture is an ancient practice through which property may be seized and then forfeited to the government because it was used to commit or facilitate a criminal offense. Moreover, and cardinally, this Court has long held that the judicial forfeiture hearing itself is sufficient to protect the rights of the interested parties, and that no additional procedures are required.

Specifically, in *Slocum v. Mayberry*, 15 U.S. (2 Wheat) 1 (1817), the Court held that a state-court lawsuit challenging the seizure and forfeiture of a ship and its cargo by federal agents could not be brought. Rather, as Chief Justice Marshall explained, the rights of the owners of the ship and cargo would be resolved by the forfeiture proceeding conducted in federal court. *Id.* at 10 ("The party supposing himself aggrieved by a seizure cannot, because he considers it tortious, replevy

the property out of the custody of the seizing officer, or of the court having cognizance of the cause."). Recognizing that forfeiture proceedings might be unreasonably delayed following the seizure, the Chief Justice noted that "[i]f the seizing officer should refuse to institute proceedings to ascertain the forfeiture, the district court may, upon the application of the aggrieved party, compel the officer to proceed to adjudication, or to abandon the seizure." *Ibid.*

Similarly, in *Gelston v. Hoyt*, 16 U.S. (3 Wheat) 246, 312 (1818), the Court "unanimously adhere[d]" to the rule of *Slocum*, and held that a state court trespass action challenging the legitimacy of a seizure by federal agents could not be brought. As Justice Story explained:

> The reasonableness of this doctrine results from the very nature of proceedings *in rem*. All persons having an interest in the subject matter, whether as seizing officers, or informers, or claimants, are parties or may be parties to such suits, so far as their interest extends. The decree of the court acts upon the thing in controversy, and settles the title of the property itself, the right of seizure, and the question of forfeiture.

Id. at 312-13. The Court, therefore, has long recognized that a separate proceeding, prior to the forfeiture hearing itself, was unnecessary to determine the reasonableness of the initial seizure. *Id.* at 318 ("Where property is seized and libelled as forfeited to the government, the sole object of the suit is to ascertain whether the seizure be rightful, and the forfeiture incurred or not.").

II. The Due Process Analysis In *$8,850* And *Von Neumann* Is Faithful To The Long History of Civil Forfeiture In The United States.

Consistent with the history of civil forfeiture, the decisions in *United States v. $8,850*, 461 U.S. 555 (1983), and *United States v. Von Neumann*, 474 U.S. 242 (1986), hold that the forfeiture hearing itself fully satisfies the demands of the Due Process Clause. As such, nothing in the Constitution requires the creation of additional proceedings to test the validity of the seizure or permit the return of the property prior to the judicial forfeiture hearing.

In *$8,850*, the Court addressed the question of "whether the Government's 18-month delay in filing a civil proceeding for forfeiture of the currency violates the claimant's right to due process of law." 461 U.S. at 556. The claimant asserted that her due process rights were violated when federal customs officials seized currency from her upon her entry into the country, but waited 18 months to commence forfeiture proceedings. *Ibid.* In rejecting the claimant's arguments and affirming the forfeiture judgment, this Court noted that "[u]nlike the situation where due process requires a prior hearing, there is no obvious bright line dictating when a postseizure hearing must occur." *Id.* at 562. Instead, the Court determined that because depriving the claimant of the use of her property while she waits for the government to initiate forfeiture proceedings is similar to a criminal defendant whose liberty is restricted while he's awaiting trial, any concern about the length of time between the seizure and the initiation of the forfeiture hearing "mirrors the concern of undue

delay encompassed in the right to a speedy trial." *Id.* at 564. As such, the Court held that the speedy trial test of *Barker v. Wingo*, 407 U.S. 514 (1972), is the proper mechanism for evaluating a claim of unconstitutional delay in instituting forfeiture proceedings. *Ibid.*

In applying the four-factor *Barker* test — which requires consideration of the length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant — to the claimant's due process claim, the Court stressed that "[t]he Government must be allowed some time to decide whether to institute forfeiture proceedings" because "[t]he customs official's decision to seize property is of necessity a hasty one." *Id.* at 565. The Court found that the pendency of criminal proceedings against the claimant further justified the delay because it "might serve to estop later criminal proceedings . . . [or] provide improper opportunities for the claimant to discover the details of a contemplated or pending criminal prosecution." *Id.* at 567. Consequently, despite the fact that the "the 18-month delay was a substantial period of time," the Court ruled that the delay was justified and that the claimant's rights were not violated. *Id.* at 569-70.

In *Von Neumann*, the Court evaluated "whether a 36-day delay by the United States Customs Service in responding to a remission petition filed by respondent in response to the seizure of his car by customs agents deprived respondent of property without due process of law." 474 U.S. at 243. The claimant had entered the country without declaring his new car. *Id.* at 245. The

statute authorizing forfeiture allowed the claimant to first pursue an administrative remission prior to judicial forfeiture proceedings. *Id.* at 244. The claimant did so, but did not receive a decision on his remission petition until 36 days after the seizure. *Id.* at 245-46. The Ninth Circuit applied the *Barker* test and held that the claimant's due process rights had been violated, noting that "'special hardships [are] imposed on persons deprived of the use of their automobiles'" and that "prejudice could be established by the inconvenience of being without a vehicle for any length of time." *Id.* at 248-49, *quoting Von Neumann v. United States*, 729 F.2d 657, 661 (9th Cir. 1984).

This Court reversed the circuit court, explaining that "[i]mplicit in this Court's discussion of timeliness in *$8,850* was the view that the forfeiture proceeding, without more, provides the postseizure hearing required by due process to protect [the claimant]'s property interest in the car." *Id.* at 249. The Court further held that although the remission procedure was widely utilized since it supplied "both the Government and the claimant a way to resolve a dispute informally rather than in judicial forfeiture proceedings," it was "not *necessary* to a forfeiture determination, and therefore [was] not constitutionally required." *Id.* at 250 (emphasis in original). Despite the claimant's urging of "the importance of automobiles to citizens in this society," the Court ruled that his "right to a forfeiture proceeding meeting the *Barker* test satisfies any due process right with respect to the car" or the money he posted as bond. *Id.* at 251.

For nearly 200 years, this Court has recognized that following a seizure of property by law enforcement, the government need not immediately commence forfeiture proceedings, but instead may take the time to complete its investigation. Consistent with this precedent – and, in particular, *$8,850* and *Von Neumann* — Illinois adopted DAFPA in 1990 (*see* Public Act 86-1382, 1990 ILL. ALS 1382 (eff. September 10, 1990)), giving the seizing police agency up to 52 days to complete its investigation and the State's Attorney another 45 days to either notify the interested parties in order to resolve the matter informally or institute *in rem* forfeiture proceedings. Moreover, the Illinois General Assembly likely did not provide for a "postseizure/preforfeiture" hearing because the state courts, like this Court, had made clear that the judicial forfeiture hearing itself is all that is required by the Constitution to protect the claimant's rights. *People v. Glenn*, 142 Ill. App. 3d 1108, 1111, 492 N.E.2d 957, 960 (5th Dist. 1986) (following *$8,850* and holding that under a similar statutory forfeiture scheme, the claimant's due process rights were not infringed by a 12-month lapse between the seizure and the commencement of the forfeiture hearing); *People v. Strong*, 151 Ill. App. 3d 28, 35-36, 502 N.E.2d 744, 749-50 (3rd Dist. 1986) (upholding a forfeiture judgment despite a 63-day delay between the seizure of the property and the filing of the forfeiture complaint).

Nevertheless, in this case, the Seventh Circuit effectively declared DAFPA facially unconstitutional because the judicial forfeiture proceeding might come too late under the statute. The court held that the Due Process Clause of the Fourteenth Amendment requires

the creation of an entirely new procedure: an adversarial, interim "postseizure/preforfeiture" hearing within days of the seizure to test its validity and to provide for release on bond of the seized property. (Pet. App. at 9a-10a.) The Seventh Circuit looked to this Court's decisions in *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993), and *Mathews v. Eldridge*, 424 U.S. 319 (1976), to support its decision that such a hearing was required because "[t]he private interest involved, particularly in the seizure of an automobile, is great" and "[t]he hardship posed by the loss of one's means of transportation, even in a city like Chicago, with a well-developed mass transportation system, is hard to calculate." (Pet. App. at 8a.)

In so doing, the Seventh Circuit overlooked the extensive history of *in rem* forfeiture and the longstanding recognition that the forfeiture hearing itself is the proper forum for resolving questions about the legitimacy of the seizure and the return of the property. As this Court stated in *Ownbey v. Morgan*, 256 U.S. 94 (1921):

> The due process clause does not impose upon the States a duty to establish ideal systems for the administration of justice, with every modern improvement and with provision against every possible hardship that may befall. It restrains state action, whether legislative, executive, or judicial, within bounds that are consistent with the fundamentals of individual liberty and private property, including the right to be heard where liberty or property is at stake in judicial

> proceedings. . . . A procedure customarily employed, long before the Revolution, in the commercial metropolis of England, and generally adopted by the States as suited to their circumstances and needs, cannot be deemed inconsistent with due process of law.

Id. at 110-11. *See also id.* at 112 (holding that "[h]owever desirable it is that the old forms of procedure be improved with the progress of time," the Fourteenth Amendment does not "require a State to relieve the hardship of an ancient and familiar method of procedure").

Moreover, even if the historical practices of *in rem* forfeiture were not so well established, neither *Good* nor *Mathews* are properly applied to the question of how quickly a forfeiture hearing must take place following the seizure of personal property. In *Good*, the Court determined that unlike cases involving the *in rem* forfeiture of personal property (which *require* an initial seizure to invoke the court's jurisdiction), "when the *res* is real property . . . the appropriate judicial forum may be determined without actual seizure." *Good*, 510 U.S. at 58, *citing The Brig Ann*, 13 U.S. (9 Cranch) 289 (1815) (Story, J.). The Court held that the Due Process Clause of the Fifth Amendment "requires the Government to afford notice and a meaningful opportunity to be heard before seizing real property subject to civil forfeiture." *Id.* at 62. Thus, unlike cases involving personal property, the Government cannot simply seize the real property first (even if it has a judicial warrant) and then institute the forfeiture proceedings at some later date.

In reaching this conclusion, the Court relied upon *Mathews'* three part test. *Id.* at 53. The Court found that the seizure of a home implicates a significant private interest, and that the risk of an erroneous deprivation was great because the owner could not easily be compensated for the loss. *Id.* at 53-56. Furthermore, the Court determined that unlike situations involving the seizure and forfeiture of personal property, "[r]equiring the Government to postpone seizure until after an adversary hearing creates no significant administrative burden." *Id.* at 59.

The Court explained that real property is inherently distinct from personal property such as cars and yachts, in that it cannot be removed from the jurisdiction, destroyed or otherwise concealed from the authorities. Thus, the "pressing need for prompt action" to protect the Government's interest is missing. *Id.* at 56-57. Further, the Court noted that unlike the long-established precedent regarding the forfeiture of vessels and other movable personal property, the historical record supporting the Government's ability to forfeit real property was far more limited, constituting only a select few cases from the 19th Century, where the Government's interest in obtaining the property was far more significant than it is in more modern times. *Id.* at 59-61.

The entire thrust of this Court's decision in *Good* was the distinction between real and personal property, a distinction which this Court has adhered to in the Fourth Amendment context "practically since the beginning of the Government." *See Carroll v. United States*, 267 U.S. 132, 153 (1925) (recognizing a

"necessary difference between a search of a store, dwelling house or other structure . . . and a search of a ship, motor boat, wagon or automobile . . . because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought"). As a result, the Seventh Circuit erred when it applied *Good* to this case.

In a similar vein, *Mathews* does not apply to the instant case because, unlike situations involving administrative decisions restricting government benefits in the 1960's and 1970's (*see, e.g.*, *Mathews*, 424 U.S. at 341-349 (termination of Social Security disability benefits); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (termination of welfare benefits)), the question of what process is due in *in rem* proceedings was settled long ago. *See United States v. La Vengeance*, 3 U.S. (3 Dall.) 297, 301 (1796). Moreover, while this Court has applied *Mathews* in other contexts, it has "never viewed *Mathews* as announcing an all-embracing test for deciding due process claims." *Dusenbery v. United States*, 534 U.S. 161, 167-168 (2002), Rather, where there is well-settled precedent supporting a particular mode of procedure, the Court will adhere to that precedent rather than begin anew by applying *Mathews*. *Ibid.* (rejecting *Mathews* as the proper framework for determining whether a particular method used to give notice satisfied the Due Process Clause where the Court had applied a "more straightforward test of reasonableness under the circumstances" for more than 50 years). *See also Medina v. California*, 505 U.S. 437, 445-446 (1992) (rejecting *Mathews* and instead applying the "far less intrusive" approach of *Patterson v. New York*, 432 U.S. 197 (1977), when deciding whether a

State's allocation of the burden of proof in a competency hearing comports with due process "because the States have considerable expertise in matters of criminal procedure and the criminal process is grounded in centuries of common-law tradition").

Contrary to the Seventh Circuit's assumption, *Mathews* itself demonstrates that the process which is due in civil forfeiture cases is simply the judicial forfeiture hearing itself and that there is no need to conduct any interim "postseizure/preforfeiture" hearing, much less an adversarial one. As this Court stated in *Mathews*, it "consistently has held that some form of hearing is required before an individual is *finally* deprived of a property interest." 424 U.S. at 333 (emphasis added). Accordingly, the Court held that Eldridge was *not* entitled to a hearing prior to the initial termination of his disability benefits, and that an administrative review process that included opportunities for an evidentiary hearing and further appellate and judicial review was sufficient to satisfy the Due Process Clause. *Id.* at 349.

In particular, the Court found that unlike recipients of welfare benefits, who face the loss of the "'very means by which to live'" while they wait for bureaucratic review, the termination of disability benefits does not pose the same type of danger to those receiving assistance because eligibility for disability benefits is "wholly unrelated to the worker's income or support from many other sources." *Id.* at 340, *quoting Goldberg*, 397 U.S. at 264. The Court determined that even though it may take more than a year after the benefits were terminated to complete the administrative review

process and obtain an evidentiary hearing, an evidentiary hearing prior to adverse administrative action was not required because of the existence of other sources of income and assistance. *Id.* at 342-43; *see also id.* at 333 (noting that *Goldberg* was "the only case" in which the Court "held that a hearing closely approximating a judicial trial is necessary").

As this case involves the loss of the use of a car or money for approximately three months while the police and the State's Attorney decide whether or not to institute statutory forfeiture proceedings, the private interest at stake and the risk of erroneous deprivation are not so great as to require the creation of an entirely new interim proceeding, especially one that would essentially duplicate the ultimate forfeiture hearing. Thus, even if *Mathews* rather than *Barker* provides the appropriate analytical framework for addressing these issues, the Seventh Circuit still erred in ruling that DAFPA violated the Due Process Clause based upon Respondents' untested allegations in the complaint. (Pet. App. at 10a.)

In sum, the Seventh Circuit's decision is erroneous and must be reversed because the judicial forfeiture hearing fully protects the claimants' rights, such that an entirely new interim, adversarial proceeding need not be created. As discussed below in Section III, this proposed interim hearing is unnecessary for another reason: Illinois law, like federal law, already provides property owners and other potential claimants with the right to petition the court for the return of seized property.

III. The Constitution Does Not Mandate The Seventh Circuit's Proposed Interim, Adversarial Hearing, A Proceeding That Causes More Problems Than It Allegedly Solves.

The Seventh Circuit attempted to distinguish *$8,850* and *Von Neumann* on the grounds that the federal statute in *Von Neumann* allowed for the filing of a petition for remission while DAFPA did not provide property owners with a procedure for seeking their property prior to the statutory civil forfeiture hearing. (Pet. App. at 7a.) The Seventh Circuit was incorrect. Illinois law — like federal law — allows property owners to petition for the return of personal property they contend the government wrongfully seized. *See, e.g.*, 765 ILCS 1030/1 (2009); 765 ILCS 1030/5 (2009); 725 ILCS 5/108-11 (2009); *People v. Moore*, 410 Ill. 241, 251, 102 N.E.2d 146, 151 (1951) and *People v. Canady*, 49 Ill. 2d 416, 423, 275 N.E.2d 356, 360 (1971).

$8,850 and *Von Neumann* correctly concluded that the *Barker* speedy trial factors were best suited to resolve any due process concerns related to the adjudication of civil forfeiture actions. Such concerns, as this Court has recognized, relate to delay and the potential loss of use of property. *See $8,850*, 461 U.S. at 564. The speedy trial test, and not the three-part due process test from *Mathews*, is best suited to address this issue because it focuses on the circumstances surrounding any such delays, considers the prejudice to the property owner and balances the needs of the individual property owner and the government.

In light of the respective burdens of proof in a civil forfeiture hearing under DAFPA, the interim hearing that the Seventh Circuit ordered does nothing more than speed up the civil forfeiture hearing itself and force the State to present its case before the seizing authority has completed its investigation and the State has prepared its case. Nothing in the Constitution compels such an absurd result.

A. The Requirement Of An Interim Hearing Does Nothing More Than Move Up The Date Of The Civil Forfeiture Hearing.

The Seventh Circuit's requirement of an interim hearing does not come without a cost. The scheduling of such an interim hearing within days of seizure threatens the rights of innocent owners unaware of the seizure of their personal property and potentially forces the State to engage in an adversarial proceeding prematurely. The Seventh Circuit did not identify any corresponding benefit associated with this cost, except to observe that automobiles are important in modern society. (Pet. App. at 8a.)

The Due Process Clause does not require such a hearing, particularly where, as here, State law allows the property owner to petition for the return of his or her property. The Seventh Circuit's opinion raises but does not precisely answer another question: what exactly is contemplated to occur at the interim hearing and how is it any different than the ultimate civil forfeiture hearing itself?

A brief review of the respective burdens shows that Respondents' request for an interim probable cause hearing within ten business days of seizure of the property (*see* Joint App. at 36a), is simply a request for the civil forfeiture hearing on a highly expedited basis prior to the police completing their investigation and the State preparing its case. Illinois law provides that "the State shall have the initial burden to show the existence of probable cause for forfeiture of the property." *People v. $1,124,905 United States Currency*, 177 Ill. 2d 314, 326, 685 N.E.2d 1370, 1376 (1997), *citing* ILCS 150/9(G). "During the probable cause portion of the proceeding, 'the court must receive and consider, among other things, all relevant hearsay evidence and information.'" *Id.* at 326-327, 685 N.E.2d at 1376, *citing* 725 ILCS 150/9(B). "The laws of evidence relating to civil actions shall apply to all other portions of the judicial *in rem* proceeding." 725 ILCS 150/9(B). If the State meets its burden of establishing probable cause, then "the burden shifts to the claimant to show by a preponderance of the evidence that the property is not subject to forfeiture." *$1,124,905 United States Currency*, 177 Ill. 2d at 326, 685 N.E.2d at 1376, *citing* 725 ILCS 150/9(G). "A claimant may satisfy this burden by establishing one of the innocent-owner defenses listed in the Act." *Ibid. citing* 725 ILCS 150/8. In substance, the adversarial, interim hearing that Respondents requested and the Seventh Circuit required is nothing more than a rushed version of the civil forfeiture hearing itself.

In both the interim hearing and the subsequent civil forfeiture hearing, the parties have the same respective burdens of proof. Consequently, the interim hearing

ordered by the Seventh Circuit and the preliminary hearing outlined in *Gerstein v. Pugh*, 420 U.S. 103 (1975) are not analogous.

In a criminal proceeding, the Fourth Amendment mandates that courts determine probable cause for detaining an arrested person without an adversary hearing. *Gerstein*, 420 U.S. at 120 (holding that a magistrate may decide these issues "in a non-adversary proceeding on hearsay and written testimony" and approving "these informal modes of proof"). If the Fourth Amendment allows such an informal probable cause hearing for deprivation of a person's liberty, it is simply not logical that the Due Process Clause mandates a more involved hearing (*i.e.*, an adversarial, interim hearing) for the alleged deprivation of property used in the commission of a crime (or proceeds from a crime) and subject to an *in rem* civil forfeiture suit. Yet, that is exactly what the Seventh Circuit held.

Gerstein is not analogous to the interim hearing that the Seventh Circuit contemplated for another reason: unlike a *Gerstein* hearing and a subsequent criminal prosecution, the burdens of proof in the interim hearing and the civil forfeiture hearing are exactly the same. *Gerstein* held that the Fourth Amendment requires a prompt judicial determination of probable cause as a prerequisite to an extended pretrial detention following a warrantless arrest. *County of Riverside v. McLaughlin*, 500 U.S. 44, 47 (1991). The State's burden in a *Gerstein* hearing is not proof beyond a reasonable doubt or even proof by a preponderance of the evidence. *See United States v. Funches*, 327 F.3d 582, 587 (7th Cir. 2003) (observing that under *Gerstein*, a finding of

probable cause does not require evidence sufficient to satisfy "a reasonable-doubt or even a preponderance standard."); *see also Gerstein*, 420 U.S. at 121. Of course, proof that the defendant committed a crime must ultimately be beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970) (holding that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged).

In marked contrast, the Seventh Circuit contemplated an interim hearing much different than a *Gerstein* hearing. The Seventh Circuit cited with approval interim hearings in statutory forfeiture schemes from Florida and Arizona. (Pet. App. at 9a.)

Under Florida law, an adversarial preliminary hearing may be requested within 15 days of receipt of the notice of seizure of real or personal property. Fla. Stat. 932.703(2)(a). The Florida statute states that:

> When an adversarial preliminary hearing is held, the court shall review the verified affidavit and any other supporting documents and take any testimony to determine whether there is probable cause to believe that the property was used, is being used, was attempted to be used, or was intended to be used in violation of the Florida Contraband Forfeiture Act. If probable cause is established, the court shall authorize the seizure or continued seizure of the subject contraband. A copy of the findings of the court shall be provided to any person entitled to notice.

Fla. Stat. 932.703(2)(c).

Similarly, in Arizona, an owner or interest holder in the property may request an order to show cause hearing within 15 days of notice of the seizure. A.R.S. § 13-4310. The Arizona statute states that "[t]he law of evidence relating to civil actions applies equally to all parties, including the state, an applicant, a petitioner, a claimant and a defendant, on all issues required to be established by a preponderance of the evidence." A.R.S. § 13-4310(E)(1).

As these Florida and Arizona statutes demonstrate, the Seventh Circuit contemplated an adversarial, interim hearing in which the State's burden of proof would be no different than its burden at the civil forfeiture hearing. Importantly, the State would likely have to proceed in an interim hearing without the benefit of discovery or the completed police investigation. Nothing in the history of civil forfeiture compels such a result.[4]

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4. As discussed more fully below in Section III(B), any analogy between Respondents' claims in the present case and the plaintiffs' claims in *Gerstein* and *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991), fails for another reason: the seizure of personal property is different than the seizure of a person's liberty. As one district judge aptly observed in an unpublished decision in a predecessor case to *Jones* and *Smith* challenging the constitutionality of a seizure under DAFPA,

> *Riverside* and *Gerstein* involved pretrial custody of a person. The holding of a person without hearing before a criminal proceeding is clearly subject to different standards than the holding of property before a civil forfeiture proceeding. The eleven months for which defendants retained plaintiff

(Cont'd)

B. The Opinion Below Improperly Equated Personal Property With Liberty.

An automobile is an item of personal property. *Dusenbery*, 534 U.S. at 163. It is not, as the Seventh Circuit posits, the functional equivalent of liberty. In this regard, the Seventh Circuit stated:

> The private interest involved, particularly in the seizure of an automobile, is great. Our society is, for good or not, highly dependent on the automobile. The hardship posed by the loss of one's means of transportation, even in a city like Chicago, with a well-developed mass transportation system, is hard to calculate. It can result in missed doctor's appointments, missed school, and perhaps most significant of all, loss of employment. This is bad enough for an owner of an automobile, who is herself accused of a crime giving rise to the seizure. But consider the owner of an automobile which is seized because the driver—not the owner—is the one accused and whose actions cause the seizure. The innocent owner can be without his car for months or years without a means to contest the seizure or even to post a

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(Cont'd)

> Taylor's money is well within the range where courts must apply flexible principles. *Riverside* does not negate the flexible approach mandated [in *$8,850*] for forfeiture proceedings.

Taylor v. O'Malley, 1991 U.S. Dist. LEXIS 19648, *6-*7 (N.D. Ill. December 24, 1991) (Leinenweber, J.).

> bond to obtain its release. It is hard to see any reason why an automobile, not needed as evidence, should not be released with a bond or an order forbidding its disposal. The person from whom cash is seized also has a strong interest in a hearing, though obviously the posting of a cash bond for cash is an absurdity.

(Pet. App. at 8a-9a.) This analysis is unsound for five reasons.

First, in discussing the importance of an automobile in modern society, the Seventh Circuit did not focus on the need for a preliminary, interim hearing but rather the need for an expedited civil forfeiture proceeding. The Seventh Circuit simply observed that the loss of an automobile can significantly impact a person's everyday life. This observation, however, does not provide a legal basis for requiring an interim, adversarial hearing that essentially duplicates the civil forfeiture hearing. Moreover, as Chief Justice Marshall observed in *Slocum*, a property owner concerned about the government's delay in instituting a forfeiture proceeding may file an equitable action compelling the filing of the forfeiture action or the return of the seized property. *See $8,850*, 461 U.S. at 569, *citing Slocum*, 15 U.S. (2 Wheat) at 10. This is the solution to the problem of the deprivation of the use of seized property, not the Seventh Circuit's mandate of an interim, adversarial hearing.

Second, the Seventh Circuit's approach seemingly presumes that all owners of the seized property are

known at or near the time of seizure, or within a short time thereafter. No basis exists for this presumption. In addition, this presumption runs contrary to the time schedules not only in DAFPA but also in the Civil Asset Forfeiture Reform Act of 2000 ("CAFRA"), 18 U.S.C. § 983 *et seq*. These time schedules provide months for the seizing authority to report the seizure to the prosecutor and for the prosecutor to file the forfeiture action. Such time periods exist for a reason — to allow the seizing authority to conduct a proper investigation and determine, among other things, the identity of owners, lien holders and any others with an interest in the property. Interestingly, 18 U.S.C. §983(a)(1)(A)(v) provides that:

> If the identity or interest of a party is not determined until after the seizure or turnover but is determined before a declaration of forfeiture is entered, notice shall be sent to such interested party not later than 60 days after the determination by the Government of the identity of the party or the party's interest.

CAFRA, therefore, recognizes that the identity of the owner of the seized property may not be known at the time of the seizure. Through its notice requirement, Section 983(a)(1)(A)(v) tacitly acknowledges that the civil forfeiture proceeding need not take place until 60 days after the government determines the identity of the property owner.

Third, in requiring an interim hearing, the Seventh Circuit focused on the plight of an innocent owner whose

personal property was seized and the hardship that could result from prolonged deprivation of the use of the property. This Court has upheld the constitutionality of a Michigan *in rem* forfeiture statute that did not recognize an "innocent owner" defense. *Bennis v. Michigan*, 516 U.S. 442 (1996). Unlike the Michigan statute, however, DAFPA and CAFRA both provide an "innocent owner" defense. *See* 725 ILCS 150/8(A)(i); 18 U.S.C. §983(d). Under DAFPA, an innocent owner may assert the affirmative defense that he or she "is not legally accountable for the conduct giving rise to the forfeiture, did not acquiesce in it, and did not know and could not reasonably have known of the conduct or that the conduct was likely to occur." 725 ILCS 150/8(A)(i).

The innocent owner would normally assert this defense at the civil forfeiture hearing. Of course, to assert an "innocent owner" defense, a property owner would have to have notice of the seizure and the forfeiture hearing. In addition, the "innocent owner" defense may necessitate that both the State and the claimant conduct discovery. Notice to unknown property owners and discovery sufficient to resolve the case on the merits cannot reasonably take place within ten business days after seizure, the time period in which Respondents contend an interim, adversarial hearing must take place.[5] This hearing does not differ in substance from the civil forfeiture hearing itself but may take place before the police have barely begun their investigation.

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5. Respondents asked the district court to declare that "a postseizure probable cause hearing [must be held] within ten business days of any seizure." (Joint App. at 36a.) The Seventh Circuit discussed a similar time period for such an adversarial interim hearing. (Pet. App. at 9a.)

Such a needlessly expedited hearing could, therefore, lead to a dismissal of the case not because of its lack of merit but because the police had not conducted or completed a thorough investigation. A dismissal under these circumstances would also result in the release of the property to the person using it before the innocent owner received any notice of the seizure and could make a claim on the property. This personal property, which might also be evidence in an ongoing criminal investigation, could then be destroyed, concealed or moved to another jurisdiction.

Fourth, the Seventh Circuit's approach creates a new remedy to fill a non-existent gap in the law. The Seventh Circuit asked "why an automobile, not needed as evidence, should not be released with a bond or an order forbidding its disposal." (Pet. App. at 8a.) Federal and Illinois law already provide property owners with such a remedy: a petition to the government for the return of wrongfully seized personal property. *See Slocum*, 15 U.S. (2 Wheat) at 10; 765 ILCS 1030/1 (2009); 765 ILCS 1030/5 (2009); 725 ILCS 5/108-11 (2009); *People v. Moore*, 410 Ill. 241, 251, 102 N.E.2d 146 151 (1951) and *People v. Canady*, 49 Ill. 2d 416, 423, 275 N.E.2d 356, 360 (1971).

Fifth, the deprivation of personal property is not the same as the deprivation of liberty and does not mandate the interim, adversarial hearing that the Seventh Circuit ordered. This Court has recognized that "the deprivation in *Barker* — the loss of liberty — may well be more grievous than the deprivation of one's use of property." *$8,850*, 461 U.S. at 565, n. 14. It is true

that the Fourth Amendment mandates a judicial determination of probable cause as a prerequisite to an extended restraint of liberty following a warrantless arrest. *Gerstein v. Pugh*, 420 U.S. 103 (1975). It is also true that civil respondents in juvenile proceedings have the same constitutional protections afforded to criminal defendants. *See, e.g., In re Gault*, 387 U.S. 1 (1967) (holding that that juvenile delinquency proceedings which may lead to commitment in a state institution must measure up to the essentials of due process and fair treatment); *In re Winship*, 397 U.S. 358 (1970) (proof-beyond-reasonable-doubt standard applies to delinquency proceedings); *Parham* v. *J. R.*, 442 U.S. 584 (1979) (proceedings to commit child to mental hospital must satisfy procedural due process). But in those juvenile proceedings, loss of liberty was at stake, not the loss of property.

The contrast between *Breed* v. *Jones*, 421 U.S. 519 (1975) and *United States v. Ursery*, 518 U.S. 267 (1996), helps illustrate why the Due Process Clause does not mandate an adversarial, interim hearing upon the seizure of personal property. *Breed* held that double jeopardy protection applies to delinquency proceedings. *Ursery*, on the other hand, held that an *in rem* civil forfeiture, where the owner of the property is subject to criminal prosecution, does not violate the Double Jeopardy Clause of the Fifth Amendment. Indeed, "civil *in rem* forfeiture is not punishment of the wrongdoer for his criminal offense." *Ursery*, 518 U.S. at 293 (Kennedy, J., concurring). By analogy, the fact an individual arrested for possession of narcotics is entitled to a *Gerstein* hearing under the Fourth Amendment does not mean that an adversarial, interim hearing must

be held within ten days regarding the civil forfeiture of an automobile used "to make possession of the controlled substance easier." *See People v. 1946 Buick*, 127 Ill. 2d 374, 377, 537 N.E.2d 748, 750 (1989).

In the final analysis, an automobile certainly affords a sense of freedom in the popular sense, but it is clearly not the functional equivalent of liberty in a constitutional sense. The Due Process Clause does not mandate that DAFPA provide an adversarial, interim hearing within ten business days of seizure, particularly where Illinois law already provides statutory and common law procedures for the return of wrongfully seized property.

C. Whether A Particular Seizure Of Personal Property Under DAFPA Satisfies Due Process Must Be Determined On A Case- By-Case Basis.

In contravention of *$8,850*, the Seventh Circuit held that DAPFA facially violated the Due Process Clause because it does not provide for an adversarial, interim hearing within a brief time after seizure. This Court took an entirely different approach in *$8,850* when determining whether the delay from the seizure of personal property to the forfeiture hearing violated due process:

> The flexible approach of *Barker*, which "necessarily compels courts to approach speedy trial cases on an *ad hoc* basis," 407 U.S., at 530, is thus an appropriate inquiry for determining whether the flexible requirements of due process have been met. As we stressed in *Barker*, none of these factors

> is a necessary or sufficient condition for finding unreasonable delay. Rather, these elements are guides in balancing the interests of the claimant and the Government to assess whether the basic due process requirement of fairness has been satisfied in a particular case.

$8,850, 461 U.S. at 564-565. While the due process concern related to pre-seizure of real property is notice (*see Good*, 510 U.S. at 53, 54), the due process concern related to a post-seizure of personal property is delay. *$8,850*, 461 U.S. at 562-563.

Unlike the *$8,850/Barker* analysis, the Seventh Circuit's approach is markedly inflexible, as it does not take into consideration the speedy trial factors: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of his right and (4) the prejudice to the defendant. In *$8,850*, this Court observed that that under *Slocum*, a property owner in a federal forfeiture proceeding could demand the filing of the forfeiture action or the return of the seized property. *Id.* at 569. The Court noted that "[t]he failure to use these remedies can be taken as some indication that [the claimant] did not desire an early judicial hearing." *Ibid.*

The same analysis applies to DAFPA. The apparent failure of prospective claimants in Illinois to petition an Illinois court for return of the property they allege was wrongfully seized (*see* 765 ILCS 1030/5 (2009)) likewise shows that such claimants did not want an early hearing. The Seventh Circuit committed error when it did not apply the *Barker* speedy trial factors to determine

whether DAPFA violates the Due Process Clause. *$8,850* shows that: (i) whether the delay in the initiation of a civil forfeiture hearing under DAFPA violates due process must be determined on a case-by-case application of the *Barker* speedy trial factors and (ii) the Seventh Circuit erroneously concluded that DAFPA facially violated the Due Process Clause.

IV. DAFPA is Modeled After The Comprehensive Drug Abuse Prevention And Control Act of 1970 And Neither Statutory Scheme Facially Violates The Due Process Clause.

The Illinois General Assembly based DAFPA "on the federal civil forfeiture statute and expressly declared its intent 'that the forfeiture provisions of this Act be construed in light of the federal forfeiture provisions . . . as interpreted by the federal courts, except to the extent that the provisions of this Act expressly differ therefrom.'" *People v. A Parcel of Prop. Commonly Known As 1945 N. 31st St., Decatur, Macon County, Illinois*, 217 Ill. 2d 481, 497, 841 N.E.2d 928, 938 (2005). Neither DAFPA nor CAFRA facially violate the Due Process Clause.

A. Both Federal Law And Illinois Law Allow A Property Owner To Seek Return Of Seized Personal Property At Any Time.

Federal law allows property owners to file a petition for remission of seized personal property. *See $8,850*, 461 U.S. at 569 (noting that under *Slocum*, a property owner "can file an equitable action seeking an order compelling the filing of the forfeiture action or return

of the seized property."); 19 U.S.C. § 1618 (authorizing the filing of a petition for remission of property seized under the customs laws); and Federal Rule of Criminal Procedure 41(g) (stating that "a person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return"). So does Illinois law.

Under *Slocum* and its progeny, courts of equity may hear a property owner's petition to compel the filing of the forfeiture action or return of the seized property. *Slocum*, 15 U.S. (2 Wheat) at 9, 10; *New Hampshire Fire Ins. Co. v. Scanlon*, 362 U.S. 404, 410, n. 9 (1960). Illinois courts, like all State courts, have inherent equitable authority. *Brundidge v. Glendale Federal Bank*, 168 Ill. 2d 235, 238, 659 N.E.2d 909, 911 (1995) (recognizing the court's "the court's inherent equitable powers.") Under their equitable powers, Illinois courts may hear petitions of property owners seeking the return of wrongfully seized personal property. *People v. Moore*, 410 Ill. 241, 102 N.E.2d 146 (1951); *People v. Kapande*, 23 Ill. 2d 230, 177 N.E.2d 825 (1961).

In *Moore*, the police seized gambling paraphernalia and cash pursuant to a search warrant. Criminal charges were brought against the property owners and the State filed a petition for confiscation of the personal property. The property owners filed an answer to the petition for confiscation and filed their own petition seeking return of the cash. In the criminal trial, the defendants filed a motion to suppress the introduction of the personal property as evidence which the court granted. The court also granted the property owners' petition for the return of the cash. The State appealed. The Illinois

Supreme Court held that "[t]he claim of the defendants to the right of possession of the property and to have the property returned to them is entirely distinct from the right of the State to use the property as evidence in the criminal trial." *Moore*, 410 Ill. at 248, 102 N.E.2d at 150. The court remanded the case for further proceedings to determine whether any of the property was subject to confiscation based upon "the nature of its use at the time of the seizure." *Id.* 410 Ill. at 252, 102 N.E.2d at 152. *See also Kapande*, 23 Ill. 2d at 237, 177 N.E.2d at 829 (following *Moore* and holding that the circuit court has jurisdiction to determine whether seized property is forfeitable contraband and "that such a proceeding is civil in nature").

Moore and *Kapande* are significant for recognizing that Illinois courts may use their equitable powers to hear petitions for the return of wrongfully seized property. In this sense, *Moore* is in accord with the principle set forth in *Slocum* recognizing that courts of equity may hear a property owner's petition seeking the prosecution of a forfeiture action or the return of the seized property.

Under Illinois law, "the equitable powers of a court may not be exercised to direct a remedy in contradiction to the plain requirements of a statute." *McDunn v. Williams*, 156 Ill. 2d 288, 309, 620 N.E.2d 385, 396 (1993). That is, however, not the case here, as the applicable Illinois statutes likewise provide property owners a comprehensive mechanism for seeking the return of wrongfully seized property.

The Illinois Law Enforcement Disposition of Property Act, 765 ILCS 1030/1 et seq. ("LEDPA") applies:

> to all personal property of which possession is transferred to a police department or other law enforcement agency of the State or a county, city, village or incorporated town, under circumstances supporting a reasonable belief that such property was abandoned, lost or stolen or otherwise illegally possessed, except property seized during a search, and retained and ultimately returned, destroyed or otherwise disposed of pursuant to order of a court in accordance with Section 108-11, 108-12 or 114-12 of the [Illinois Code of Criminal Procedure].

765 ILCS 1030/1 (2009). The plain language of this provision shows that LEPDA applies to all personal property of which possession is transferred to the seizing agency "under circumstances supporting a reasonable belief that such property . . . [is] otherwise illegally possessed." 765 ILCS 1030/1 (2009). *See also* 765 ILCS 1030/2 (2009) (recognizing that upon request from the owner of personal property or other person entitled to possession thereof, the government "shall return the property after such person provides reasonable and satisfactory proof of his ownership or right to possession and reimburses the agency for all reasonable expenses of such custody.") Section 5 of LEDPA states that "[t]he owner or other person entitled to possession of such property may claim and recover possession of the property." 765 ILCS 1030/5 (2009). Thus, Section 5 of LEDPA provides a statutory basis for property owners

to petition for the immediate return of personal property seized pursuant to DAFPA.[6]

Section 1 of LEDPA excludes property seized in accordance with Section 108-11, 108-12 or 114-12 of the Illinois Code of Criminal Procedure. Those provisions concern the return of property which is seized pursuant to a search warrant (725 ILCS 5/108-11 (2009); 725 ILCS 5/108-12 (2009)) and property which is seized without a warrant but is the subject of a criminal prosecution (725 ILCS 5/114-12 (2009)).

Section 108-11 allows Illinois courts to release seized property upon petition of the owner. *People v. Canady*, 49 Ill. 2d 416, 423, 275 N.E.2d 356, 360 (1971); *People ex rel. Carey v. Covelli*, 61 Ill. 2d 394, 402, 336 N.E.2d 759, 764 (1975) (same). *See also* 725 ILCS 5/108-12 (2009) (providing for the disposition of obscene material). Similarly, Section 114-12 specifically provides that

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6. As a practical matter, property owners do not always need to file such a petition to secure the return of their seized property. When the State's Attorney sends a notice of pending forfeiture to the property owner and all known interest holders of the property, the notice includes a description of the property, the estimated value of the property, the date and place of seizure, the conduct giving rise to forfeiture or the violation of law alleged, and a summary of procedures and procedural rights applicable to the forfeiture action. *See* 725 ILCS 150/6 (2009). In addition, the State's Attorney sends a letter advising the owner and other interest holders that Assistant State's Attorneys are available to discuss the matter. Such meetings frequently occur, and as a result, the State's Attorney either settles or rescinds the majority of the administrative forfeiture cases. If the action is rescinded, the property is returned to the owner.

"[a] defendant aggrieved by an unlawful search and seizure may move the court for the return of property." 725 ILCS 114-12(a) (2009).

Under these provisions, a property owner, whether he is a defendant in a criminal prosecution or the owner of property which was seized pursuant to a warrant, may petition the court for its return. In addition, sections 1, 2 and 5 of LEDPA authorize all other property owners or persons holding a property interest to file the same petition. Consequently, under Illinois law, any owner or other persons entitled to possession of personal property may claim and recover possession of such property at any time.

B. CAFRA Potentially Allows For A Longer Period Of Time To Elapse Prior To The Initiation Of A Civil Forfeiture Proceeding Than DAFPA Does.

DAFPA allows the seizing police agency up to 52 days to complete its investigation and notify the State's Attorney and then provides the State's Attorney an additional 45 days to either notify the owner or institute *in rem* forfeiture proceedings. *See* 725 ILCS 150/5 (2009); 725 ILCS 150/9 (2009). Unless continued for good cause, the civil forfeiture hearing must be convened within 60 days after the property owner files an answer to the complaint. 725 ILCS 150/9(F) (2009).

Under CAFRA, the federal government is required to send notice to property owners no more than 60 days after seizure if the seizing authority is the United States and 90 days after seizure if the seizing authority is State

or local government. 18 U.S.C. § 983(a)(1)(A)(i) and (iv). If the federal government did not have adequate evidence at the time the complaint was filed to establish the forfeitability of the property, then a supervisory official in the headquarters office of the seizing agency may extend the period for sending notice by 30 days. 18 U.S.C. § 983(a)(1)(B). Significantly, upon a motion by the Government, a court may extend the period for sending notice by an additional 60 days, which period may be further extended by the court for 60-day periods, as necessary. 18 U.S.C. § 983(a)(1)(C).

The time schedules in DAFPA and CAFRA have sufficient length and flexibility to enable the seizing authority to conduct its investigation. Nothing in the history of civil forfeiture, including the decisions in *$8,850* and *Von Neumann*, support the notion that these time schedules facially violate the Due Process Clause. The Seventh Circuit's conclusion that DAFPA violates due process because it does not provide an interim, adversarial hearing within days after seizure is not legally tenable.

C. The Seventh Circuit's Decision Impairs The Rights Of The Community As It Needlessly Weakens The State's Ability To Utilize *In Rem* Civil Forfeiture Proceedings As A Law Enforcement Tool.

Not all *in rem* forfeitures are the result of the property owner's blameworthy conduct. *See Austin v. United States*, 509 U.S. 602, 629 (1993) (Kennedy, J., concurring in part and concurring in the judgment). This Court has long held that *in rem* forfeiture is predicated

on the theory "that the thing is primarily considered the offender." *Good*, 510 U.S. at 82 (Thomas, J., concurring in part and dissenting in part); *Harmony* v. *United States*, 43 U.S. (2 How.) 210, 237 (1844) (finding that a ship used for piracy was subject to forfeiture but the cargo on the ship was not). In other words, the relevant inquiry is whether the lawful property committed an offense. *See Austin*, 509 U.S. at 628 (Scalia, J., concurring in part and concurring in the judgment) (observing that "the relevant inquiry for an excessive forfeiture under 21 U.S.C. § 881 is the relationship of the property to the offense: Was it close enough to render the property, under traditional standards, 'guilty' and hence forfeitable?")

While civil *in rem* forfeiture has long been understood as independent of criminal punishments, *United States v. Ursery*, 518 U.S. 267, 295 (1996) (Kennedy, J., concurring), the Illinois General Assembly found that:

> the civil forfeiture of property which is used or intended to be used in, is attributable to or facilitates the manufacture, sale, transportation, distribution, possession or use of substances in certain violations of the Illinois Controlled Substances Act [720 ILCS 570/100 et seq.], the Cannabis Control Act [720 ILCS 550/1 et seq.], or the Methamphetamine Control and Community Protection Act [720 ILCS 646/1 et seq.] will have a significant beneficial effect in deterring the rising incidence of the abuse and trafficking of such substances within this State. . . The General Assembly further finds

> that the federal narcotics civil forfeiture statute upon which this Act is based has been very successful in deterring the use and distribution of controlled substances within this State and throughout the country.

725 ILCS 150/2 (2009). Not surprisingly, "instrumentality-forfeiture statutes are not directed at those who carry out the crimes, but at owners who are culpable for the criminal misuse of the property." *Ursery*, 518 U.S. at 294 (Kennedy, J., concurring).

Criminal investigations generally proceed on a parallel track with *in rem* civil forfeitures. Requiring an interim, adversarial hearing by a fixed, arbitrary date without any consideration of whether the seizing authority's investigation has been completed not only jeopardizes the *in rem* proceeding but may lead to the release of potential evidence in a criminal action long before the criminal statute of limitations has run. Without providing any corresponding benefit not already available under Illinois law, the Seventh Circuit's call for an interim hearing needlessly weakens a long-used, historic tool of law enforcement.

It cannot be disputed that the police and State's Attorney have a significant interest in retaining the property while they complete their investigation into the ownership of the seized property because, unlike real estate, cars and cash are mobile and easily disposed of, and the police and prosecutors must ensure that the property is not needed as evidence in a criminal prosecution. Society, to be sure, has a strong interest in removing the instrumentalities of narcotics offenses from potentially being used again for such purposes.

CONCLUSION

The court of appeals' decision should be reversed.

Respectfully submitted,

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RESPONDENT'S BRIEF

No. 08-351

JUL 3 1 2009

In The

Supreme Court of the United States

ANITA ALVAREZ
State's Attorney of Cook County, Illinois,

Petitioner,

v.

CHERMANE SMITH, EDMANUEL PEREZ, TYHESHA BRUNSTON, MICHELLE WALDO, KIRK YUNKER and TONY WILLIAMS,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF (REPRINTED)

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QUESTION PRESENTED

Whether Due Process requires at the very least a prompt, informal check against self-interested decisions that result in the impoundment of valuable personal property for months at a time, without review by an objective decision maker?

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United States v. Von Neumann, 474 U.S. 242 (1986) ..... *passim*

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City of Chicago Ordinance 2-14-132(2) 56

MISCELLANEOUS:

Brent D. Most, Bruce L. Benson, and David Rasmussen, *Entrepreneurial Police and Drug Enforcement Policy, 104 Pub. Choice 285 (2000)* 50

Chicago Appleseed Fund for Justice, *A Report on Chicago's Felony Courts*, (2007) 76-78, http://www.chicagojustice.org/foi/documents/criminal_justice_full_report.pdf 49

Donald J. Boudreaux and Adam C. Pritchard, *Civil Forfeiture and The War on Drugs: Lessons from Economics and History*, 33 San Diego L. Rev. 79, (1996) 50

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Eric Blumenson and Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U.Ch. L. Rev. 35 (1998).....50

Executive Office for the United States Attorneys, U.S. Dept. of Justice, 38 United States Attorney's Bulletin 180 (1990).....51

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Gregory L. Acquaviva & Kevin M. McDonough, *How to Win a Krimstock Hearing: Litigating Vehicle Retention Proceedings Before New York's Office of Administrative Trials and Hearings,* 18 Widener L.J. 23 (2008).....56

Laurence A. Harper, The English Navigation Laws (1939).....28

James W. Ely, *The Guardian of Every Other Right, A Constitutional History of Property Rights* (3rd ed. 2007).....47

John L. Worral, *Addicted to the Drug War: The Role of Civil Asset Forfeiture as a Budgetary Necessity In Contemporary Law Enforcement,* 29 J.Cr. Just. 171 (2001).....30, 50

Justice Robert H. Jackson, *The Task of Maintaining Our Liberties: The Role of the Judiciary*, 39 ABA J. 961 (1953).....47

Katherine Barker & Mireille Jacobson, *Finders Keepers: Forfeiture Laws, Policing Incentives, and Local Budgets,* 91 J. of Pub. Econ. 2113 (2007).....30

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Peter Manikus, Mindy S. Trossman & Jack C. Coppelt, *Crime and Justice in Cook County: A Report of the Criminal Justice Project*, Center for Urban Affairs Policy Research, Northwestern University (November 1989) 49

Press Release, Chicago Police Dep't, *Chicago Committed to Reducing Violent Crime and Strengthening Community Partnerships in 2009* (Jan. 16, 2009), *available at* http://www.chicagopolice.org/MailingList/PressAttachments/W2008crimestats.pdf 8

Richard Miniter, *Ill-Gotten Gains*, 25 Reason 32, 34 (Aug. Sept. 1983) 50

STATEMENT OF THE CASE

The Illinois Drug Asset Forfeiture Procedure Act (DAFPA, 725 ILCS 150\1 et seq.) created a forfeiture scheme that gives financial incentives to municipal police departments and local prosecutors to seize and impound property for forfeiture. 720 ILCS 570\505(g)(1)-(3). The owners of the property in question are sometimes the target of a criminal prosecution, but the DAFPA imposes the same procedures on innocent owners, including most of the Respondents in this case. In all forfeiture cases, 65 percent of the forfeited funds go to the law enforcement agency that seized the property; 25 percent go to the prosecutor's office; and 10 percent are assessed as court costs. *Id.*

Despite the pecuniary incentives given to police and prosecutors, the DAFPA fails to provide private property owners with an opportunity for a hearing before an objective decision maker for at least six months. The time table is as follows. The DAFPA initially allows the Chicago Police Department fifty-two days after the seizure of property to decide whether to recommend that Petitioner file a forfeiture action. 725 ILCS 150\5. Petitioner then has an additional forty-five days to review the forfeiture recommendation. 725 ILCS 150\6(A). Only after the Petitioner decides to file for forfeiture is notice sent to the owner, who then has forty-five days to file a verified claim and post a cost bond. 725 ILCS 150\6(C)(2). The cost bond is set at 10 percent of the value assigned to the property by Petitioner or $100

dollars, whichever is greater. *Id.* Posting bond does not result in release of the seized property and functions, in effect, as a filing fee. 725 ILCS 150\6(C)(3).

After a property owner posts the cost bond, Petitioner Alvarez still has another forty-five days to "institute judicial in rem forfeiture proceedings." 725 ILCS 150\6(C)(2). These benchmark steps allow one hundred and eighty-seven days (52+45+45+45=187) to elapse between the initial seizure and filing of the forfeiture complaint. 725 ILCS 150\9(C)(2). During that time criminal court judges, who preside over related criminal proceedings, may not order the return of the property. 725 ILCS 150\9(J). Nor may owners bring an action to recover the property by way of replevin. 720 ILCS 570\505(d). After a forfeiture action is filed by Petitioner, another sixty days may pass for "good cause shown" (725 ILCS 150\9(F)) and, after that, the forfeiture trial may be stayed indefinitely, when a related criminal proceeding is pending. 725 ILCS 150\9(J).

The DAFPA preempts most attempts to secure the return of impounded property during the first one hundred and eighty-seven days before the forfeiture complaint is filed. 725 ILCS 150\9; 720 ILCS 570\505(d). The Act allows for interim remedies similar to those in the federal system, but leaves application of those interim remedies to the discretion of government officials, including Petitioner. 725 ILCS 150\2. In the federal system, during the first one hundred and eighty-seven days, property owners

(even those who are not subject to prosecution) can: (1) post bond to secure the return of their property; (2) win the prompt return of their property based on a showing of hardship; (3) pursue published remission and mitigation procedures; (4) file a motion pursuant to Federal Rule 41(g) for return of property; and (5) file a common law motion to compel the government to initiate the forfeiture action. *See United States v. Eight Thousand, Eight Hundred and Fifty Dollars ($8,850)*, 401 U.S. 555 (1983) and 18 U.S.C. 983(f)(1). As the DAFPA was applied to Respondents, none of these interim federal remedies were available. (J.A. 32a at 16, 21-23).

Three of the Respondents (Smith, Perez, and Brunston) had their cars seized by Chicago police officers acting without warrants, but pursuant to the DAFPA. (J.A. 32a, 33a at 24-30). None of these Respondents was charged with a criminal offense. *Id.* Each of them was forced to wait more than a year without a judicial hearing and without the opportunity to secure the release of their property by posting a bond. *Id.* The other Respondents (Yunker, Waldo, and Williams) had cash seized. (J.A. 32a, 33a at 28-30). Their money was held for months without judicial review of the lawfulness of the original seizure or of its continued detention. *Id.* All of the Respondents had a statutory right to assert an innocent owner defense,[1] which was deferred pending

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[1] Illinois law provides that private property may not be forfeited if owners show that they lack actual or constructive

(Continued on following page)

the filing of the forfeiture action and then stayed for months after that. (J.A. 32a-33a at 24-31, 33).

Respondents filed their Section 1983 (42 U.S.C. 1983) Complaint against the Cook County State's Attorney, the City of Chicago, and the Superintendent of the Chicago Police Department, and Respondents alleged that they were entitled to a prompt hearing or the opportunity to secure the release of their cars by posting bond. (J.A. 31a-33a). Respondents requested class certification and an injunction, but they did not demand damages or seek dismissal of the then pending state forfeiture cases. *Id.* Before discovery commenced, Petitioner and the City of Chicago moved to dismiss based on res judicata, collateral estoppel, and *Jones v. Takaki,* 38 F. 3d 321, 324, 325 (7th Cir. 1994); (J.A. 41a-56a and 66a, 67a) *Jones* held that the only process that is due is the forfeiture trial. (J.A. 67a at 2).

In their Response to the motions to dismiss, Respondents acknowledged that *Jones* was the then controlling precedent, but cited *Krimstock v. Kelly*, 306 F. 3d 40 (2d Cir. 2002) as casting doubt on the continued validity of *Jones*. (J.A. 75a). Respondents maintained that *Mathews v. Eldridge*, 424 U.S. 319 (1976) set out the correct due process standard, which entitled them to a prompt, post-seizure hearing or the opportunity to secure the release of their cars by

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knowledge that their property was used in the commission of an offense. 725 ILCS 150\8(A).

posting bond. (J.A. 75a). Respondents did not ask the court to declare the DAFPA unconstitutional on its face. (J.A. 75a, at para. 3). The District Court granted the motions to dismiss based solely on *Jones*. (J.A. 27a at 38).

Respondents then filed a timely Notice of Appeal, after which the case proceeded to briefing and argument before the Seventh Circuit. (Pet. App., 1-11). The primary issues before the Seventh Circuit were whether *Mathews* or *Barker v. Wingo*, 407 U.S. 514 (1972) set the applicable due process standard and whether the forfeiture trial was all the process that was owed to property owners under the Due Process Clause. (Pet. App., at 5-10). The Seventh Circuit overruled *Jones,* and held that *Mathews* rather than *Barker* set the due process standard, so the forfeiture trial was not the only process due to the Respondents. (Pet. App., at 10, 11).

The Seventh Circuit explained that, "In short, our fresh look at this issue causes us to conclude that given the length of time . . . between the seizure of property and the opportunity for an owner to contest the seizure under DAFPA, some sort of mechanism to test the validity of the retention of the property is required." (Pet. App., at 10). The court noted that the hearing "should be prompt but need not be formal," and left "it to the district court to determine the notice requirement and what a claimant must do to activate the process." *Id.* The remand order did not "envision lengthy evidentiary battles which would duplicate the final forfeiture hearing." *Id.* The details

were left to the district court to consider "whether a bond or order can be fashioned to allow the legitimate use of the property while the forfeiture proceeding is pending." (Pet. App., at 10).

The case was then remanded for discovery and to allow the District Court to "fashion appropriate relief consistent with this opinion." (Pet. App., at 10). The Seventh Circuit did not set a deadline for post-seizure hearings nor did that Court attempt to describe the scope of the hearing, other than as informal. (Pet. App., at 10,11). Because *Smith* overruled *Jones*, the *Smith* panel circulated its opinion among all active members of the Seventh Circuit, except Judge Rovner who did not participate. (Pet. App., at 11). None of the active members of the Seventh Circuit voted to rehear the matter en banc. *Id.*

Petitioner then filed a petition with this Court and identified the "Question Presented" as whether the Due Process Clause requires a "probable cause" hearing in advance of a forfeiture trial and, if so, whether due process is measured by *Mathews* or *Barker*. The Seventh Circuit, however, did not order a "probable cause" hearing in advance of the forfeiture trial. (Pet. App., at 10,11).

SUMMARY OF THE ARGUMENT

Nemo iudex in sua causa – No one shall be a judge in his own cause. Fundamental principles of law that long antedate our constitutional democracy

regard protection against official bias as a simple, but necessary precaution. Unchecked self-interest breeds government overreaching, produces unnecessary constitutional injuries, and destroys faith in the government. Our constitutional democracy correctly presumes that self-interest cannot go unchecked. *The Federalist No. 51.* Every branch of government is checked by another, and every reasonable precaution is taken to avoid self-interested decision making. The most common and effective check against government overreaching and abuse of power is a hearing before a disinterested, objective decision maker, who is obliged to hear both sides of a case before making a decision. *Fuentes v. Shevin*, 407 U.S. 67, 80-82 (1972) Without this essential check, citizens suffer unnecessary harm, and the public loses confidence in a system that stacks the deck.

Despite these principles and despite their powerful pecuniary interest, the police and prosecutor served as the sole judges over Respondents' private property for more than a year. Indeed, as a result of Petitioner's application of Illinois's asset forfeiture scheme, Petitioner held Respondents' (Smith, Brunston, and Perez) primary means of transportation for more than a year without any check on the validity of the impoundment.

Forfeiture proceeds add millions of dollars annually to the Petitioner's budgetary coffers. The City of Chicago (City), whose officers seize property for forfeiture, takes an even larger bite of the forfeiture pie. The Chicago Police Department

recently boasted that it netted more than $13.5 million dollars in cash from asset forfeitures in 2008, a $7 million dollar increase from the previous year.[2] In difficult economic times when other revenue sources dry up, forfeiture revenues are needed to fill holes in municipal budgets.

Petitioner blinks at this indisputable fact and says, "Trust me, I won't make mistakes, and the officers who seize property will not overreach." But "Trust me" is a feeble check; our Constitution demands far more. *Harmelin v. Michigan*, 501 U.S. 957, 979 n. 9 (1991) (Scalia, J.).

The dangers of bias, moreover, are compounded by the protracted delays that are routinely inflicted on innocent property owners. To protect against these risks, objective review of all decisions must occur promptly, especially official decisions that are infected with the risk of bias. *United States v. James Daniel Good Real Property,* 510 U.S. 43 (1993).

Interim hearings or the opportunity to post bond supply essential constitutional checks on the Petitioner's power to impound private property for months, perhaps years. These checks are needed all the more when the agencies that impound the property act out of their own self-interest. Our

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[2] Press Release, Chicago Police Dep't, *Chicago Committed to Reducing Violent Crime and Strengthening Community Partnerships in 2009* (Jan. 16, 2009), *available at* http://www.chicagopolice.org/MailingList/PressAttachment/2008crimestats.pdf.

founding fathers were keenly aware that, "[t]he great end, for which men entered into society, was to secure their property." *Entick v. Carrington*, 19 How. St. Tr. 1029, 1066 (C.P.1765) as quoted in *Good*, 510 U.S. at 81 (Thomas, J., concurring in part and dissenting in part). Personal property, however, is not secure, when local police officers and a state prosecutor, with significant pecuniary interests in the forfeiture of private property, can seize and hold that property for months on end.

At a minimum due process means the opportunity to be heard "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). Whenever possible that protection should be conferred *before* the deprivation occurs. Only in "extraordinary situations" may the hearing be postponed. And even then, due process still provides that a prompt, post-seizure hearing must be held. *Good*, 510 U.S. at 53.

For decades the Court has applied a cost-benefit analysis, now known as the *Mathews* standard, to determine when and how citizens will have the opportunity to "speak up" in their defense, and when and how an otherwise unchecked government action will be reviewed by an objective decision maker. *Mathews v. Eldridge*, 424 U.S. 319 (1976). *Mathews* offers a time-tested, due process methodology that directs lower courts to balance all the relevant factors to reach a clear rule that then can be uniformly applied by lower courts across the country. It is no wonder that the *Mathews* framework is now standard

in evaluating the procedures required in all sorts of settings, whether they deal with the seizure of private property or the operation of complex schemes of modern administrative law. *See e.g.*, *Good*, 510 U.S. at 52-62; *Cleveland Board of Education v. Loudermill,* 470 U.S. 532 (1985).

Evidence of the power of the *Mathews* formulation is apparent from the key role it played when the Court last addressed this issue in the forfeiture context. The Court held that citizens are constitutionally entitled to an informal hearing that precedes the forfeiture trial. *Good*, 510 U.S. at 62. That conclusion seems inescapable given that crowded dockets usually delay civil trials for years. An interim hearing avoids the harm that results from delay between seizure and trial. Without an interim hearing, the "meaningful time" component of all due process equations goes unsatisfied. As a result, this Court has made it crystal clear that: (1) *Mathews* applies to all types of property interests; (2) *Mathews* applies to forfeiture proceedings; and (3) a forfeiture trial is not all the process that is due. *Id.*

That holding finds additional support in the common law and in the early colonial statutes, which allowed for a right to compel a prompt forfeiture hearing and the opportunity to post bond. *Slocum v. Mayberry*, 15 U.S. (2 Wheat.) 1 (1817). The need for these protections is even more acute now that local police departments and prosecutors have enormous pecuniary interests in the outcome of all forfeiture proceedings.

The Court's decisions in *United States v. $8,850*, 401 U.S. 555 (1983) and *United States v. Von Neumann*, 474 U.S. 242 (1986) did not cavalierly brush aside the obvious and compelling need for prompt, objective review to check self-interested decisions. Those two cases raised issues that are vastly different from the one now before the Court. As Judge Sotomayor made plain in *Krimstock v. Kelly,* 306 F. 3d 40 (2nd Cir. 2002), and the Seventh Circuit understood here, *$8,850* and *Von Neumann* did not address whether Due Process requires some interim mechanism to promptly test the validity of a seizure. In *$8,850* and *Von Neumann*, the Court's focus was carefully limited to the claimants' demands that the Court dismiss entirely the forfeiture complaint, even though both claimants were guilty of criminal conduct and had ready access to effective interim remedies. Because the issue was dismissal of the forfeiture charges, the Court chose *Barker* as the most apt standard of review. Respondents, on the other hand, never requested dismissal of the forfeiture charges. Their only demand – consistent with their constitutional rights – was for an opportunity to state their cases before an objective decision maker promptly after their property was impounded.

Respondents' case does not mount a collateral attack on the federal forfeiture scheme, nor do Respondents question the government's right to impound and forfeit property. Respondents only insist they are entitled to a prompt, interim hearing before an objective decision maker to check against potential

bias and overreaching. On that point, which is the only one before the Court, the weakness of *Barker's* inadequate methodology is exposed by its refusal to allow for any interim relief. *Barker* only contemplates dismissal of the forfeiture charges. *Mathews* does not place the Court in this straightjacket because *Mathews* opens up the opportunity for an interim hearing that does not fixate on the ultimate outcome of the case.

Mathews, of course, can only be applied after first learning the relevant facts, which are still unknown. To fill that void, the Seventh Circuit wisely remanded the case to the District Court to develop the applicable standards within the *Mathews* framework.

The Seventh Circuit's remand order was a cautious and incremental step. The federal government, the City of New York, and the City of Chicago supply working models that prove prompt, interim hearings are feasible They give confidence to the view that interim hearings or a bond posting procedure can work as a substitute for indefinite impoundment. Nonetheless, the Seventh Circuit left these matters for further development, saying only that the hearing "should be prompt but need not be formal." Thereafter it left "it to the district court to determine the notice requirement and what a claimant must do to activate the process. . . ." *Id.* The Seventh Circuit did not "envision lengthy evidentiary battles which would duplicate the final forfeiture hearing." (Pet. App., at 10). Details were properly left to the district court to consider "whether a bond or order can be

fashioned to allow the legitimate use of the property while the forfeiture proceeding is pending." *Id.*

The remedy the Seventh Circuit generally described is not an expedited forfeiture trial or a final ruling of any sort. To the extent that court described the interim hearing, the court envisioned an early opportunity for innocent owners to set out the equities that favored a temporary release of their cars, perhaps after posting a security bond, pending a final forfeiture trial. The court did not order interim "probable cause" hearings. Because a timely hearing is both feasible and constitutionally necessary, the Court should affirm, and the case should be sent back for full development of the facts.

ARGUMENT

The Seventh Circuit Correctly Held That Due Process Requires A Prompt And Independent Check Against The Self-Interested Decisions By Government Officials That Result In The Impoundment Of Valuable Personal Property For Months At A Time.

Respondents' property was seized without warrants and then detained by Petitioner for many months, in some cases more than a year, without providing an opportunity for Respondents to either post bond or tell their side of the story to a neutral decision maker. (J.A. 32a, 33a). In the face of this manifest injustice, the Petitioner blithely claims the

only process that is owed to Respondents is the forfeiture trial, perhaps after a year or more has passed. (Pet. Brf. 29-32). That harsh result cannot be correct. A favorable verdict that comes a year after a car is impounded cannot "cure the temporary deprivation that an earlier hearing might have prevented." *Connecticut v. Doehr*, 501 U.S. 1, 15 (1991). The Seventh Circuit, therefore, was correct in holding that due process entitles Respondents to some form of prompt, interim process, and the court was correct in holding that *Mathews v. Eldridge,* 424 U.S. 319 (1976), not the earlier case of *Barker v. Wingo*, 407 U.S. 514 (1972), offers the due process framework for deciding when that interim hearing should occur and what the scope of the hearing will be.

I. Due Process Is A Constitutionally Conferred Right That Demands A Hearing At A "Meaningful Time." A Delay Of Six Months Or More Is Not A Meaningful Time.

A check on the government's power to impound property is essential because "Individual freedom finds tangible expression in property rights." *United States v. James Daniel Good Real Property*, 510 U.S. 43, 61, 81 (1993). The founders of our government experienced firsthand the "hated writs of assistance" – that were "denounced as the worst instrument of arbitrary power . . . because they placed the liberty of every man in the hands of every petty officer." *Stanford v. Texas*, 379 U.S. 476, 481, 482 (1965). The

same concerns with government abuse animate the Due Process Clause of the Fifth and Fourteenth Amendments, which are intended to secure private property against the ravages of self-interested or mistaken government officials. For that reason due process "is conferred, not by legislative grace, but by constitutional guarantee." *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 541 (1985). Due process does not accept protracted constitutional harm, when a prompt hearing can alleviate the harm. Instead, due process demands a hearing "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

With rare exceptions, the "meaningful time" for notice and an opportunity to be heard is *before* the deprivation occurs. *Good,* 510 U.S. at 53 (1993). In "extraordinary situations," the government's interest in prompt seizure "justifies postponing the hearing until after the event." *Good*, 510 U.S. at 53 citing *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972). However, when those exceptional circumstances occur, a prompt, post-deprivation hearing is essential to offset the additional risks that are necessarily created by government action. *See e.g., C.I.R. v. Shapiro*, 424 U.S. 614, 629 (1976). "For when a person has an opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantively unfair and simply mistaken deprivations of property interests can be prevented." *Fuentes*, 407 U.S. at 81.

A prompt hearing is especially necessary when the action under review is, or could be, shrouded in self-interest. Petitioner is not a neutral decision

maker (*Tumey v. Ohio*, 273 U.S. 510, 522 (1927)), and a police officer's assessment of probable cause is not infallible. *Gerstein v. Pugh*, 420 U.S. 103 (1975). Petitioner's substantial pecuniary interest raises doubt about her objectivity. *Ward v. Monroeville*, 409 U.S. 57, 60 (1972). A financial interest "may bring irrelevant or impermissible factors into the prosecutorial decision." *Marshall v. Jericho*, 446 U.S. 238, 249 (1980). Self-interest skews decision making, a peril that is best checked by prompt, objective review. *Harmelin v. Michigan*, 501 U.S. 957, 979 n. 9 (1991) (Scalia, J.).

Nor does it make sense to defer review of a police officer's assessment of probable cause beyond the time when it is possible to do so. *Gerstein*, 420 U.S. at 112-114. Police officers are not the final arbiters of probable cause, even when they, and their departments, have no pecuniary stake. *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991). This Court should not ignore the obvious – the Chicago Police Department has an enormous financial interest in pursuing forfeitures in times of ever tightening municipal belts. On-the-street decisions of police officers engaged "in the often competitive enterprise of ferreting out crime" (*Johnson v. United States*, 333 U.S. 10, 14 (1948)) are trusted only long enough to allow for independent judicial review, even when the department is not taking a 65 percent cut of the forfeiture action.

Respondents do not claim that their property interests must be considered on the same expedited

schedule as a liberty interest. Nor do Respondents challenge the government's right to lawfully seize property and aggressively pursue forfeiture. However, once Respondents' property was seized, a prompt, hearing was a necessary and a constitutionally required check. When the hearing will be held and what the scope of the hearing will be are the only questions now up for review. Those questions are best answered by applying the same due process methodology the Court has employed since *Mathews* was decided in 1976.

II. *Mathews* Is A Time-Tested And Pragmatic Methodology For Assessing What Process Is Due Between Seizure and Trial.

1. *Mathews* Applies to All Types of Property Interests.

Mathews is, and has been for decades, the Court's preferred due process methodology whenever a right to private property clashes with a government interest. The Court has applied *Mathews,* or a *Mathews*-like process, to the impoundment of wages, (*Sniadach v. Family Finance Corp.*, 395 U.S. 337, 339 (1969)), license suspension proceedings (*Bell v. Burson*, 402 U.S. 535, 539 (1971)), filing fees in divorce proceedings (*Boddie v. Connecticut*, 401 U.S. 371, 379 (1971)), termination of public assistance benefits (*Goldberg v. Kelly*, 397 U.S. 254, 263-271 (1970)), pre-judgment attachment of household appliances (*Fuentes v. Shevin*, 407 U.S. 67, 80 (1972)),

prejudgment attachment of personal property (*Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974)), termination of unemployment benefits (*Fusari v. Steinberg*, 419 U.S. 379, 383, 389 (1975)), termination of public utility service (*Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978)), temporary suspension of an employee for-cause (*Barry v. Barchi*, 443 U.S. 55, 66-67 (1979)), termination of a public employee with a for-cause employment right (*Cleveland Board of Education v. Loudermill,* 470 U.S. 532 (1985)), a banker's right to a post-suspension hearing (*Federal Deposit Insurance Corp. v. Mallen*, 486 U.S. 230 (1988)), prejudgment attachment of real property (*Connecticut v. Doehr*, 501 U.S. 1, 19, 20 (1991)), a public employee's right to pre-suspension hearing (*Gilbert v. Homar*, 520 U.S. 924 (1997)), and seizure of a car for parking violations. *City of Los Angeles v. David*, 538 U.S. 715 (2003).

The property interests in these cases vary by context, so too the competing government interest and the timing and scope of judicial relief. But in every case *Mathews* guided the Court's inquiry. In every case, the Court held that pre-seizure notice and a hearing is necessary, unless exigent circumstances outweighed the citizen's right to uninterrupted enjoyment of her property. In those exceptional circumstances where pre-seizure notice was not feasible, the Court consistently held that either a prompt, post-seizure hearing or the opportunity to post bond was constitutionally required.

In *North Georgia Finishing,* for example, the Court struck down a statute that permitted pre-judgment, impoundment of a bank account because the account was "put totally beyond use during the pendency of the litigation." *North Georgia Finishing v. Di-Chem*, 419 U.S. 601, 608 (1975). The Court reached the same conclusion in *Sniadach,* where a state statute that allowed wage impoundments without an interim hearing was deemed unconstitutional. *Sniadach*, 395 U.S. at 338-340. The wage earner had to wait for the trial on the merits, which meant that "in the interim the wage earner [was] deprived of his enjoyment of earned wages without any opportunity to be heard and to tender any defense he may have . . . " *Sniadach*, 395 U.S. at 339. In *North Georgia Finishing* and *Sniadach*, the Court applied a *Mathews*-like due process analysis and held that a long delayed trial is not the only process that is due, which is all the Seventh Circuit held in Respondents' case.

Trial delays are still a serious problem everywhere. "Given the congested civil dockets in federal courts, a claimant may not receive an adversary hearing until months after the seizure." *Good*, 510 U.S. at 56. The Court continues to address those delays by applying *Mathews,* and by requiring interim hearings. *See e.g., Barry v. Barchi*, 443 U.S. 55, 60 (1979); *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 536-538 (1985); *Federal Deposit Insurance Corp. v. Mallen*, 486 U.S. 230, 241, 242 (1988); *Connecticut v. Doehr*, 501 U.S. 1, 19,

20 (1991); *City of Los Angeles v. David*, 538 U.S. 715, 716, 717 (2003). Whether the property interest is in real estate, statutorily created benefits, or cash, *Mathews* controls, because, as the Court has explained, "[w]e are no more inclined now than we have been in the past to distinguish among different kinds of property in applying the Due Process Clause." *North Georgia Finishing*, 419 U.S. at 608.

Mathews has withstood the test of time, and its methodology is particularly apt to the seizure of cars. Circuit courts across the country already apply *Mathews* to car impoundment cases similar to the scheme at issue here. *See e.g.*, *Coleman v. Watt*, 40 F. 3d 255, 261 (8th Cir. 1994); *Goichman v. Rhueban Motors Inc.*, 682 F. 2d 1320, 1323-24 (9th Cir. 1982); *Breath v. Cronvich*, 729 F. 2d 1006, 1011 (5th Cir. 1984); *De Franks v. Mayor of Ocean City*, 777 F. 2d 185 (4th Cir. 1985). In *Krimstock v. Kelly*, 306 F. 3d 40 (2nd Cir. 2002), the Second Circuit applied *Mathews* after an exhaustive review of the Court's due process concerns in car impoundments settings. Consistent with Respondent's position, it held that a prompt, post-seizure hearing was necessary and feasible. *Krimstock*, 306 F. 3d at 58-60. A predictable process of evaluation, like an established precedent, "fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). *Mathews* meets that well-established standard.

2. *Mathews* Applies To Forfeiture Proceedings.

Mathews also establishes the Court's due process methodology in forfeiture cases and calls for interim remedies. In *Good*, the Court considered what due process standard governed the seizure of real property. *Good*, 510 U.S. at 48-54. The Court sought to identify the most apt textual source to guide its inquiry. The Court chose the Due Process Clause, as construed in *Mathews,* over the Fourth Amendment, even though the property was seized pursuant to a warrant. *Id.* Neither *Barker* nor the Sixth Amendment's Speedy Trial Clause entered the Court's text-oriented analysis. *Good*, 510 U.S. at 46-55. Indeed, even if the Speedy Trial Clause were implicated, "the proper question is not which Amendment controls but whether either Amendment [was] violated." *Good*, 510 U.S. at 50.[3]

Furthermore, Respondents' request for a prompt, post-seizure hearing is more compelling than was the case for a pre-seizure notice and a hearing in *Good,* where eighty nine pounds of marijuana, vials of hashish, and drug paraphernalia were found on the property. *Good*, 510 U.S. at 46-48. The owner of the

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[3] Fourth Amendment jurisprudence also requires a prompt, post-seizure hearing. *See Gerstein v. Pugh*, 420 U.S. 103 (1975). The Women's Criminal Defense Bar Association develops this point in greater detail in its amicus brief.

property was charged and eventually convicted. *Id.* After his conviction, a warrant was issued authorizing seizure of the land for forfeiture. *Id.* The property was seized and the rental income was held by the government pending the outcome of the forfeiture proceeding. *Id.* The owner claimed he had a constitutional right to notice and a pre-seizure hearing, and the Court agreed. *Good,* 510 U.S. at 62. The Court held that in addition to the warrant authorizing seizure of property and in addition to the forfeiture trial, the owner was entitled to pre-seizure notice and an opportunity to be heard. *Id.*

Respondents (Smith, Bruntson, and Perez) are not charged with, let alone convicted of, any criminal offenses. Their property was not seized pursuant to a warrant, and they are not seeking a pre-seizure hearing. In all of these respects, their case is superior to the property owner's right to a pre-seizure hearing in *Good.* The only significant difference is that real property was seized in *Good*, but personal property was seized from Respondents. However, the type of property at stake only affects how the *Mathews* factors play out, not the antecedent question of whether the *Mathews* framework applies. The Solicitor General's brief makes precisely this point when it explains that *Mathews* "is fully consistent with . . . the Court's traditional analysis. . . . [of] the timing of proceedings to forfeit personal property." (S.G. Brf., at 9).

The Solicitor General's point is on target. Once personal property is in police custody, the due process

analysis tracks that for real property in *Good*. After the police impound personal property, "the reasons that justify dispensing with the magistrate's neutral judgment evaporate." *Gerstein*, 420 U.S. at 114. At that point, "the State's reasons for taking summary action (decrease) . . . (while the) need for a neutral determination of probable cause increases significantly." *Id.* Informal judicial or administrative review is feasible and necessary, particularly when the trial itself is likely many months away. *Krimstock,* 306 F. 3d at 44-48.

Nonetheless, Petitioner and amici cite *Calero-Toledo v. Pearson Yacht Leasing Co.,* 416 U.S. 663 (1974) and maintain that the forfeiture trial is all the process that is due following a forfeiture related impoundment. However, *Calero-Toledo*, which involved the government's seizure of a yacht, merely represents an example of an "extraordinary situation" that justifies postponing notice and a hearing until after the seizure. The Court did not address the Constitutional right to prompt post-seizure notice and hearing. *Id.* at 679, n.15 ("No challenge [was] made to the District Court's determining that the form of post-seizure notice satisfied due process requirements.") And the Court's justification for dispensing with the usual pre-seizure hearing, the impracticality of such a hearing, does not apply after the government has seized control of the property.

Only post-seizure process is at issue now, and the post-seizure process that was offered in *Calero-Toledo* far exceeded what was offered to Respondents, who

also are entitled to raise a statutory innocent owner defense that was not present in *Calero-Toledo*. The statutory, post-seizure process in *Calero-Toledo* required the government to notify owners within 10 days of the seizure. *Calero-Toledo,* 416 U.S. at 668, n.2, citing P.R. Laws Ann., Title 34, §1722. An owner then had the right to file a complaint within 15 days, and the case was to be "conducted as in an ordinary civil action." *Id.* Once the complaint was filed, the owner had the right to post bond and secure the return of the seized property pending the outcome of the trial. *Calero-Toledo,* 416 U.S. at 668, n.2. *See also United States v. Mack*, 295 U.S. 480, 483 (1935) – Prohibition Act forfeiture statute allowed property owners to post bond and secure the return of their property pending trial. Thus, post-seizure process in *Calero-Toledo* is consistent with Respondents' request for similar post-seizure remedies, but *Calero-Toledo* is irreconcilable with Petitioner's assertion that the forfeiture trial, whenever it is finally held, is all the process that is due.

Nor are Petitioner and amici correct when they imply that Respondents' case is governed by *Bennis v. Michigan*, 516 U.S. 442 (1996). The issue in *Bennis* was whether the defendant's wife, a co-owner of a car, that was unquestionably used to commit a crime, was entitled to an innocent owner defense as a matter of constitutional law. *Bennis*, 516 U.S. at 445, 446. The issue in *Bennis* was whether as a matter of substantive due process the innocent co-owner's interest in the car was forfeitable. *Id.* The Court held

that substantive due process did not protect the co-owner's interest in the car, but the court did not address the issue of post-impoundment, procedural due process. *Id.*

Illinois, like at least 48 other states, has an innocent owner defense as a matter of state law.[4]

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[4] Alabama (Ala. Code § 20-2-93(h) (2009)); Alaska (Alaska Stat. § 17.30.110(4)(A) (2009)); Arizona (Ariz. Rev. Stat. Ann. § 13-4304(2) (2009)); Arkansas (Ark. Code Ann. § 5-64-505(a)(4)(B), (6)(B) (2009)); California (Cal. Health & Safety Code § 11469(j) (Deering 2009)); Colorado (Colo. Rev. Stat. § 16-13-504(2.1)(a) (2008)); Connecticut (Conn. Gen. Stat. § 54-36h(c) (2008)); Delaware (Del. Code Ann. tit. 11, § 2323(2) (2009)); Florida (Fla. Stat. § 893.12(2)(b),(c) (2009)); Georgia (Ga. Code Ann. § 16-13-49(e)(1)(A)-(D) (2009)); Hawaii (Haw. Rev. Stat. § 712A-5(2)(b), (d) (2009)); Idaho (Idaho Code Ann. § 37-2744 (a)(4)-(6) (2009)); Illinois (720 Ill. Comp. Stat. 570/505(a)(3)(ii) (2009)); Indiana (Ind. Code § 34-24-1-4(a) (2009)); Iowa (Iowa Code § 809A.5(1)(a)-(b) (2008)); Kansas (Kan. Stat. Ann. 60-4106(a)(3)-(4) (2008)); Kentucky (Ky. Rev. Stat. Ann. § 218A.410(h)(2)-(3) (West 2008)); Louisiana (La. Rev. Stat. Ann. 40:2605(1), (3) (2009)); Maine (Me. Rev. Stat. Ann. tit. 15, § 5821(4), (7)(A) (2009)); Maryland (Md. Code Ann., Crim. Proc., § 12-103(a), (b)(2) (LexisNexis 2009)); Massachusetts (Mass. Gen. Laws ch. 94C, § 47(c)(1)-(3) (2009)); Michigan (Mich. Comp. Laws. § 333.7521(c)(ii), (iv) (2009)); Minnesota (Minn. Stat. § 609.5311 subd3(d) (2008)); Mississippi (Miss. Code Ann. § 41-29-153(a)(4)(B) (2008)); Missouri (Mo. Rev. Stat. 513.615 (2009)); Montana (Mont. Code Ann. § 44-12-102(2)(b) (2007)); Nebraska (Neb. Rev. Stat. § 28-431(4) (2009)); Nevada (Nev. Rev. Stat. § 179.1164(2) (2009)); New Hampshire (N.H. Rev. Stat. § 318-B:17-b(III)(a) (2009)); New Mexico (N.M. Stat. Ann. § 30-31-34(G)(2) (2008)); New York (delegated to municipal authority, *see, e.g., County of Nassau v. Velasquez*, 44 A.D.3d 987 (2007) (affirmative defense in Nassau County)); North Carolina (N.C. Gen. Stat. § 90-112(a)(4)(b) (2009)); North Dakota (N.D. Cent. Code

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Private property owners who are unaware of an illicit use of their property cannot be divested of their property under Illinois law. 725 ILCS 150\8(A). Respondents (Smith, Perez, and Brunston) are innocent owners who had no reason to believe that their property was used for illegal purposes. As such, Petitioner and her amici do not question Respondents' interest in the seized property or their right to contest the forfeiture on grounds that were not present in *Bennis*. In any event, the right to procedural due process is "absolute," regardless of any substantive due process right. *Carey v. Piphus*, 435 U.S. 247, 259 (1978). Procedural due process focuses on the opportunity "to protect persons . . . from mistaken or unjustified deprivations," rather than the ultimate outcome of the hearing. *Id.* Respondents raise a procedural due process claim that asks merely for an

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§ 19-03.1-36(1)(e)(2) (2009)); Ohio (Ohio Rev. Code Ann. § 2933.43(B)(1) (West 2009)); Oklahoma (Okla. Stat. Ann. tit. 63, § 2-503(4)(b) (2009)); Oregon (Or. Const. Art. XV, § 10); Pennsylvania (42 Pa. Cons. Stat. Ann. § 6801(a)(4)(ii) (2009)); Rhode Island (R.I. Gen. Laws § 21-28-5.04.2(b)(3) (2009)); South Carolina (S.C. Code Ann. § 44-53-586(a) (2008)); South Dakota (S.D. Codified Laws § 34-20B-73 (2009)); Tennessee (Tenn. Code Ann. § 53-11-451(a)(4)(B) (2009)); Texas (Tex. Crim. Proc. Code Ann. § 59.02(c)(1)-(2) (Vernon 2009)); Utah (Utah Code Ann. § 24-1-2(3) (2009)); Vermont (Vt. Stat. Ann. tit. 18, § 4241(a)(5), (6)(C) (2009)); Virginia (Va. Code Ann. § 19.2-386.8(3) (2009)); Washington (Wash. Rev. Code § 69.50.505(1)(d)(i)-(ii) (2009)); West Virginia (W. Va. Code § 60A-7-703(a)(5)(ii) (2009)); Wisconsin (Wis. Stat. Ann. § 961.55(1)(d)(2) (West 2009)); Wyoming (Wyo. Stat. Ann. § 35-7-1049(a)(v)(B) (2009)).

opportunity to state their cases at a meaningful time, an issue that was never considered in *Bennis*.

Furthermore, neither interim remedies nor the lawfulness of the impoundment were at issue in *Bennis,* and the innocent co-owner (wife) was the spouse of the driver, so the driver's right to use the car was not disputed. Respondents, on the other hand, have a statutory right to an innocent owner defense, the drivers of their cars were not co-owners or spouses, and Respondents maintain that the original seizure was unlawful as to them. An exigent circumstance might have justified the decision to seize and impound the car, at first, but once the exigency was removed and the car was impounded, Respondents were entitled to a hearing to prove the officer's spontaneous judgments were mistaken and the impoundment was unlawful. *Good,* 510 U.S. at 58-62.

III. Common-Law Tradition Supports Respondents' Right To Interim Relief.

Petitioner attempts to sidestep the Solicitor General's concession – that *Mathews* can be applied to determine the timing of a post-impoundment hearing – by insisting that the common law did not provide for interim remedies in forfeiture cases. (Pet. Brf. at 29-35). However, Petitioner first misstates the issue and then misidentifies the relevant common law and early colonial practices. In *Slocum v. Mayberry,* 15 U.S. (2 Wheat) 1 (1817), the Court found that, at common law, property owners were allowed to initiate

actions to compel the government to act. Chief Justice Marshall, writing for a unanimous Court, specifically noted that when personal property is seized by the government for forfeiture, the owner has a common law right to demand immediate judicial review. *Slocum,* 15 U.S. at 4. As the Court explained, "[i]f the seizing officer should refuse to institute proceedings to ascertain the forfeiture, the district court may, upon application of the aggrieved party, compel the officer to proceed to adjudication, or to abandon the seizure." *Slocum,* 15 U.S. at 4.

The same common law right was affirmed in *Murray's Lessee. Murray's Lessee v. Hoboken Land & Improvement Co.,* 59 U.S. (18 How.) 272, 276 (1855). There, a distress warrant was issued ex parte, and personal property was seized. As soon as the distress warrant was executed, the owner had the right to "bring before a district court the question, whether he is indebted as recited in the warrant . . . " *Murray's Lessee,* 59 U.S. at 284. Neither the executive nor the legislative branch could delay the owner's right to judicial review. *Id.* at 285. "The [owner] had the right to file a complaint seeking the return of his property, and all that was required was for him to file his bill [complaint] and give security." *Id.* Colonial statutes also allowed citizens to post bond and reclaim their property. "Ships and goods were often released upon bail, pending the issue's determination." Lawrence A. Harper, The English Navigation Laws (1939) at 200. Likewise, the Magna Carta suggests that the king could not seize land or chattels before trial, as long as

the debtor had sufficient pledges. *Murray's Lessee,* 59 U.S. at 276,277.

At common law, property owners were not left at the mercy of government whim and indecision for one hundred and eighty-seven days following a seizure. If the owner believed that the government was taking too long, he had the right to compel the government to act, and any harm caused by protracted pretrial delays also was offset by letting owners post bond.

Petitioner and amici ignore the relevant common law and colonial practices, and they then compound their error with the mistaken assertion that the forfeiture trial was the only process that was due. According to Petitioner, "The Court . . . has long recognized that a separate proceeding, prior to the forfeiture hearing itself [is] unnecessary to determine the reasonableness of the initial seizure." (Pet. Brf. 35). Petitioner, albeit mistakenly, claims that an unbroken line of common law cases holds that the forfeiture trial, and only the forfeiture trial, is required by due process. (Pet. Brf. 33-35). That assertion is unquestionably false, and none of the cases cited by Petitioner address the issue of post-seizure process.

The cited cases stand only for the propositions that: (1) possession of the res usually is necessary to establish in rem jurisdiction (*United States v. La Vengeance*, 3 U.S. (3 Dall.) 297 (1796); *The Brig Ann*, 13 U.S. (9 Cranch) 289 (1815); *Gelston v. Hoyt*, 16 U.S. (3 Wheat.) 246 (1818); *United States v. Stowell*, 133 U.S. 1 (1890)); (2) neither the common law nor

the Due Process Clause mandate an innocent owner defense (*Harmony v. United States*, 42 U.S. (2 How.) 210 (1844); *Dobbins Distillery v. United States*, 96 U.S. 395 (1877); *J.W. Goldsmith, Jr.-Grant Co. v. United States*, 254 U.S. 505, 508 (1921); *Philips v. Commissioner of Internal Revenue*, 283 U.S. 589 (1931)), and (3) a previous criminal prosecution for related offenses does not bar a forfeiture proceeding under the Double Jeopardy Clause (*Various Items of Personal Property v. United States*, 282 U.S. 577 (1931)).

The relevant common law and early colonial statutory practices – the ones identified in *Slocum* and *Murray's Lessee* – included checks on the government's power to impound personal property. Those ancient remedies are all the more necessary now that forfeiture proceedings are a major budgetary source for many police departments and prosecutors' offices. *See* Katherine Barker & Mireille Jacobson, *Finders Keepers: Forfeiture Laws, Policing Incentives, and Local Budgets,* 91 J. of Pub. Econ. 2113 (2007). Forfeiture proceeds are now so entrenched in the budgets of police departments and local prosecutors that they are "addicted" to them. John L. Worral, *Addicted to the Drug War: The Role of Civil Asset Forfeiture as a Budgetary Necessity in Contemporary Law Enforcement,* 29 J.Crim. Justice 171, 182 (2001). As self-interest increases, so too does the need for due process checks by objective decision makers. *The Federalist No. 51.*

IV. *Von Neumann* And *$8,850* Are Consistent With The Seventh Circuit's Use Of *Mathews*.

1. In *Von Neumann* and *$8,850* Interim Remedies Were Available.

Petitioner and amici also rely on *United States v. Eight Thousand, Eight Hundred and Fifty Dollars ($8,850)*, 461 U.S. 555 (1983) and *United States v. Von Neumann*, 474 U.S. 242 (1986) and mistakenly conclude that the forfeiture trial is all the process that is due under the *Barker* framework. (Pet. Brf., at 36-40). However, the issue in *Von Neumann* and *$8,850* was very different from the one presented here. The distinction is critical, given that due process is a flexible concept whose requirements necessarily respond to the property interests at issue and the relief requested. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). *Von Neumann* and *$8,850* dealt with the speed with which a forfeiture trial must begin, not whether Due Process requires a mechanism to promptly test the validity of a seizure. As a result, *Von Neumann* and *$8,850* are inapposite as applied to Respondents' case.

The essential facts of *$8,850* and *Von Neumann* are that: (1) the property owners were, unlike here, also the accused; (2) they, unlike Respondents, had access to a variety of prompt, post-seizure remedies, and; (3) after taking advantage of those administrative remedies they nonetheless demanded dismissal of the forfeiture charges, a remedy Respondents eschewed.

The claimant in *$8,850* filed a false customs report when she entered the country, so her money was seized. *$8,850*, 461 U.S. at 557. Within eight days, she received written notice of her right to request remission and mitigation review, and she immediately opted to pursue that remedy. *Id.* at 558, 559. She did not seek to establish a right to post-seizure process in the form of interim remedies. Because the federal forfeiture system provided interim remedies that effectively checked any government overreaching, the only relief she requested was dismissal of the forfeiture charges. *Id.* at 569.

An analogous analysis applies to *Von Neumann*. There, the claimant entered the country without declaring that he was driving a newly purchased car. *Von Neumann*, 474 U.S. at 245. The car was seized and "the same day . . . Von Neumann prepared a Petition for Remission or Mitigation of Forfeitures and Penalties Incurred. . . ." *Id.* Within two weeks he posted bond, and his car was returned to him. *Id.* Thirty-six days after the car was seized, customs offered to reduce the penalty from $24,500 dollars (the value of the car) to $3,600 dollars. *Von Neumann*, 474 U.S. at 246. An administrative appeal was taken and a final decision, upholding that remission, was rendered less than ninety days after the seizure. *Id.* Thus, Von Neumann had a final and very favorable administrative result within three months of the seizure.

Neither *$8,850* nor *Von Neumann* addressed the use of interim remedies. In both cases the claimants had ready access to prompt, interim remedies of which they successfully availed themselves. The absence of any interim check is the issue in this case, and that issue was not considered in *$8850* or in *Von Neumann*.

Instead, the Court's focus in *$8,850* and *Von Neumann* was on dismissal as the only remedy that was requested. The claimants insisted they were entitled to dismissal of the forfeiture complaints, even though interim remedies were available and they had successfully employed those interim remedies. The Court borrowed *Barker* from the Sixth Amendment context because *Barker* applies when the dispute is limited to dismissal of the charges. Respondents, in contrast, never requested dismissal of the forfeiture charges or any other relief that would affect the speedy disposition of the forfeiture proceedings. The Seventh Circuit in Respondents' case and the Second Circuit in *Krimstock* correctly noted that the claimants' demands for dismissal in *$8,850* and *Von Neumann* pose "a different question from whether there should be some mechanism to promptly test the validity of the seizure." (Pet. App., at 78). That different question is now before the Court, and that question is answered, as it always is, by applying *Mathews*, not *Barker*.

2. *Mathews* is the Preferred Standard to Address Interim Remedies.

Mathews directs the Court's attention to four factors: (1) the private interest that is affected by the official action; (2) the risk of an erroneous deprivation of the private interest; (3) the probable value of additional or substitute safeguards; and (4) the government's interest in retaining the property. *Mathews*, 424 U.S. at 340-344. A *Barker* inquiry proceeds along an entirely separate path. The relevant *Barker* factors are: (1) the length of delay; (2) the cause of the delay; (3) whether the accused asserted his right to a speedy trial; and (4) whether and to what degree the accused suffered any prejudice. *Barker*, 407 U.S. at 530-32. *Mathews* and *Barker* do not overlap, so the choice of due process standard is a stark one.

Borrowing *Barker's* speedy trial test from the Sixth Amendment makes sense when the issue is whether the forfeiture charges should be dismissed. But *Barker* is inapposite here because: (1) the *Barker* factors are a bad fit in that they only take into account the interests of the criminal defendant and the state, and not those of innocent property owners or creditors; (2) *Barker* focuses on the dismissal remedy, which is irrelevant to the question presented in this case; (3) the application of *Barker* in this context would upset Supreme Court precedent; and (4) *Barker's* case-by-case approach is inefficient and uncertain, depriving all stakeholders of clear rules. The *Mathews* factors, in contrast, have been

consistently and effectively applied by courts in similar circumstances, and those factors balance all relevant interests involved in an efficient, categorical way that provides clear guidelines to all interest holders.

3. *Barker* Cannot be Applied Effectively to Innocent Owners.

Barker's Sixth Amendment methodology does not carry over, fairly, to innocent owners, who are not themselves the accused and are not seeking dismissal of the forfeiture complaint. The Sixth Amendment only applies to *criminal prosecutions* and only to the *accused*. *See United States v. Marion,* 404 U.S. 307, 312 (1971). "On its face, the protection of the Amendment is activated only when a criminal prosecution has begun and extends only to those persons who have been 'accused'. . . ." *Marion*, 404 U.S. at 312. For that reason, the Sixth Amendment "would seem to afford no protection to those not yet accused." *Marion,* 404 U.S. at 313. Even when limited to the accused, the Court has described the right to speedy trial as "amorphous," "vague," "slippery," and "unique in its uncertainty." *Barker,* 407 U.S. at 521, 522, and 529. When *Barker's* speedy trial concerns are extended to persons who are not the accused, *Barker* plunges from "vague" to unworkable.

The first *Barker* factor is the length of the delay. The general consensus today is that the delay must be a year or more to trigger a *Barker* inquiry. *Doggett*

v. United States, 505 U.S. 647, 651, 652 (1992); *United States v. Munoz-Franco,* 487 F. 3d 25 (1st Cir. 2007); *United States v. Armeda-Saemiento*, 545 F. 2d 785 (2nd Cir. 1976); *Hakeem v. Beyer*, 990 F. 2d 750, 759-60 (3rd Cir. 1993); *Cowart v. Hargett*, 16 F. 3d 642, 646 (5th Cir. 1994); *United States v. Brown,* 498 F. 3d 523, 530 (6th Cir. 2007); *United States v. Arceo,* 535 F. 3d 679, 684 (7th Cir. 2008); *United States v. McGhee,* 532 F. 3d 733, 739 (8th Cir. 2008); *United States v. Santanna,* 526 F. 3d 1257, 1261 (9th Cir. 2008); *United States v. Ingram,* 446 F. 3d 1332, 1336 (11th Cir. 2006); and *United States v. Taylor*, 497 F. 3d 673, 677 (D.C. Cir. 2007). The Framers of the Constitution certainly did not countenance that law enforcement agencies hungry for forfeiture revenue would take private property without any neutral and objective check for a year or more. *Connecticut v. Doehr,* 501 U.S. at 15.

The second *Barker* factor, the reason for the delay, also undercuts any attempt to extend *Barker* to innocent owners. *United States v. Loud Hawk*, 474 U.S. 302, 315 (1985). When the accused chooses to delay the criminal proceedings, the forfeiture trial is routinely delayed for months or even years. *See* 725 ILCS 150\9 (J) – allowing for good cause contiuances while the criminal case is pending. Those delays, however, do not redound to the disadvantage of the government for purposes of the civil forfeiture proceeding, because the government did not cause the delay. *Loud Hawk,* 474 U.S. at 315, 316. Yet, in this context, the innocent owner is denied any prompt

check on the government's seizure of her property through no fault of her own.

The final *Barker* factor is prejudice to the accused. *Barker*, 407 U.S. at 532, 533. This factor has three sub-factors, the most important of which asks whether the delay caused by the government has impaired the defense. This consideration bears no relationship to the fate of innocent owners. In contrast, *Mathews* accounts for and balances the rights of private property owners and the interests of the state – the very interests at stake in this case.

Suppose an innocent owner (unrelated to the accused and not a co-owner, as in this case) has a witness who heard the owner tell the owner's boyfriend not to use her car. The boyfriend borrows the car anyway, and is arrested and charged with a narcotics offense. The car is seized and held for forfeiture, but the witness dies while the criminal case is pending. Neither the prosecution nor the accused is harmed by the witness' death, but the innocent owner loses her best witness. The accused is responsible for all of the delay in the criminal proceeding and in the forfeiture proceeding, so any prejudice suffered by the innocent owner cannot be assigned to the government. Using *Barker* as intended, the innocent owner is not entitled to dismissal of the forfeiture case. Why disregard the clear teachings of *Mathews* to impose such an inequitable result?

4. *Barker's* Focus is too Narrow to be Applied Here.

Mathews and *Barker* also serve different functions, for *Barker* does not allow for any remedy other than dismissal of the charges. *Strunk v. United States*, 412 U.S. 434, 440 (1973). As such, *Barker* offers little guidance in this setting, where the issue is not whether Petitioner's forfeiture actions must be dismissed, but rather what process is due between impoundment and trial. *Barker* throws up its hands at this inquiry, and thus leaves unchecked the self-interested decisions of public figures acting in a quasi-judicial capacity. *Barker* looks backward and asks only whether the delay was so long that the charges must be dismissed. *Strunk*, 412 U.S. at 440. *Barker* never asks what intermediate relief can fix the problem.

In contrast, *Mathews* allows for interim remedies, like those already well-entrenched in the federal forfeiture system. Those interim remedies are constitutionally essential when the government impounds property without affording the owner – often an innocent owner, accused of no crime – prior notice and the opportunity to be heard. Prompt interim remedies reflect "the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference." *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972). *Mathews* offers a tested framework that protects that "high value" by allowing for interim remedies that *Barker* overlooks.

5. *Barker* is Irreconcilable with Established Precedent.

Furthermore, *Barker's* narrow focus makes it unwise to use it as an all-purpose standard in place of *Mathews*. For example, tested by *Barker*, the wage garnishment that was found unconstitutional in *North Georgia Finishing* would pass muster. *Barker* would allow the bank account to be frozen for a year or more, unless the wage earner could show actual prejudice to the merits of his defense. For the same reasons, the harness racing trainer who was entitled to a post-suspension hearing within 30 days in *Barry v. Barchi*, 443 U.S. 55 (1979) would be told to wait 360 days or more, had the Court applied *Barker* rather than *Mathews*.

Given the Court's extensive reliance on *Mathews* over so many years, there is no sound reason to suddenly veer off course by adopting a crimped due process standard that undermines previously well-established holdings. *See State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997); *Agostini v. Felton*, 521 U.S. 203, 235 (1997) – counseling against such changes. Neither *$8,850* nor *Von Neumann* command such a change in course, since those cases were not concerned with interim remedies. *Mathews*, on the other hand, has decades of thoughtful and consistent history standing behind it. It also has the flexibility to carry forward with predictable results.

6. *Barker's* Case-by-Case Approach is Inefficient.

Mathews' categorical balancing is also far more efficient than *Barker's* case-by-case approach in assessing the need for interim relief. *Mathews* itself held that a person who is denied disability benefits under the social security system is not entitled to a hearing prior to that termination. The categorical judgment of the Court was that the system would work much better with post-deprivation hearings. The implicit assumption behind that judgment was that neutral parties had no strong incentive to unfairly deny individuals their appropriate benefits, so that it would be costly to run hearings which would prove to be unnecessary in many cases.

The situation here is quite different in every relevant regard. When parties who are not charged with crimes seek to recover their property, they are likely to have a strong case in favor of its return. In addition, the current schemes, unlike *Mathews,* do not allow for an award of monetary compensation to offset the loss of use and the depreciation in value that are inevitable consequences when a car is impounded for months at a time. Nor does the government have any strong reason to delay the hearing, whose outcome only becomes more unreliable with the passage of time. The odds of success in these forfeiture cases are far greater than in *Mathews*: the dangers of abuse are far more apparent; and the obvious risk of bias compounds the problem. This situation does not call for the wishy-washy,

case-by-case approach that *Barker* offers. It calls for the clear articulation of a rule that can be applied accurately and fairly across a huge number of cases.

V. Petitioner's New Assertion – That Respondents Had Access To Interim Remedies – Was Not Raised In The Lower Courts, And The DAFPA Preempts The Remedies Petitioner Now Cites.

In a complete reversal of course, Petitioner now suggests that interim remedies are available after all. (Pet. Brf. 60-64). This about-face is both too little and too late. Until her brief in this Court, Petitioner never suggested that any interim remedies were open to Respondent. Petitioner should not be allowed to raise new arguments that were neither raised nor considered in the lower courts, particularly when her new argument depends on questions of fact that cannot be resolved on the current record. And even if her last-ditch argument were in the record, the remedies cited by Petitioner are nonetheless preempted by the DAFPA.

At the eleventh hour, Petitioner claims that the Law Enforcement Disposition of Unclaimed Property Act (LEDPA, 765 ILCS 1030\1 et seq.) provides Respondents with a remedy. The argument carries no weight because the LEDPA is limited to property that comes into a police department's possession "under circumstances supporting a reasonable belief that such property was abandoned. . . ." 765 ILCS 1030\1.

Respondents' property was not "lost or abandoned." It was seized by the government. Petitioner does not explain how seizure incident to an arrest suggests abandonment. Even if Petitioner could concoct a plausible explanation, the DAFPA preempts this remedy. 720 ILCS 570\505(d). Nor does it make sense to invoke "unlawfully possessed" provision of the LEDPA throughout since the owner is asserting that she "lawfully possessed" the property.

Petitioner's tortured search for new remedies then leads to Section 108 of the Illinois Criminal Code. 725 ILCS 5\108-1 et seq. Petitioner boldly insists that "Section 108-11 authorizes criminal court judges "to release seized property" and allows property owners to "recover possession of such property at any time." (Pet. Brf. 64, 65). That is plainly wrong. Section 108-11 is restricted to items that have been seized by the police and then returned to the criminal court. 725 ILCS 5\108-11. The DAFPA, however, expressly precludes criminal court judges from ordering the return of forfeitable property. 725 ILCS 150\9(J).

The cases cited by Petitioner – apparently for the proposition that a common law right to seek return of seized property exists – are equally implausible. Petitioner attempts to skirt the DAFPA's unambiguous preemption terms by citing *People v. Moore*, 410 Ill. 241, 102 N.E.2d 146 (1951) as evidence that property is returnable pursuant to a motion for return of seized property. (Pet. Brf. 61, 62). *Moore*, however, was decided in 1951, almost four decades

before the DAFPA was enacted, and could not countermand an act that was not yet in effect. The same fate awaits *People v. Kapande*, 23 Ill.2d 230, 177 N.E.2d 825 (1961), another case cited by Petitioner. (Pet. Brf. 62). Preemption was not at issue in *Kapande,* which was also decided long before the DAFPA was enacted. Furthermore, *Kapande* involved the return of gambling proceedings, not forfeiture based on an alleged narcotics offense. Nor is there reason to believe Illinois courts will order Petitioner to return impounded property or file a forfeiture action in advance of the timetable set by the DAFPA. *People ex rel. Devine v. Murphy*, 181 Ill.2d 522, 693 N.E.2d 349 (1998); *People ex rel McCarthy v. Firek*, 5 Ill.2d 317, 125 N.E.2d 637 (1955) – a motion to compel, like a mandamus action, is not available to force discretionary acts by a prosecutor.

Petitioner concedes that "the equitable powers of a court may not be exercised to direct a remedy in contradiction to the plain requirements of a statute." (Pet. Brf., at 62). Since Section 150\9(J) prohibits criminal court judges from ordering the return of property that is subject to forfeiture (725 ILCS 150\9(J) (2009)), an order to return forfeitable property would be in "contradiction of the plain requirements" of the DAFPA. Neither *Moore* nor *Kapande* hold otherwise. 725 ILCS 150\9(J). And it is revealing that Petitioner has not cited a single post-DAFPA case that circumvents the preemption provisions of the DAFPA.

Finally, Petitioner now claims she provides remission and mitigation opportunities in advance of the forfeiture trial. (Pet. Brf., At 64, n.6). Her new argument is not supported by the Record. First, Respondents alleged that Petitioner fails to offer any interim relief, and those allegations must be accepted as true for now. *Conley v. Gibson*, 355 U.S. 41 (1957). Second, Petitioner failed to raise this issue in the lower courts. Third, neither Petitioner nor the DAFPA supply any notice of Petitioners recently alleged, in-house procedures for remission. Due process, however, requires public notice of in-house, administrative procedures. *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 12-15 (1978). By all accounts no such notice is offered, so Petitioner's in-house remission procedures, if they exist, do not meet the constitutional baseline for adequate notice. At best, Petitioner's recently proclaimed in-house procedures are another example of Petitioner acting as a judge in her own case. Therefore, the interim remedies Petitioner belatedly cites were not available to Respondents.

VI. Although The Seventh Circuit Prudently Remanded The Case For Development Of The Facts, An Informal Interim Hearing Or The Opportunity To Post Bond Is Feasible And Constitutionally Required.

1. The Seventh Circuit Prudently Remanded to Develop the Facts.

The Seventh Circuit's remand order left key matters open for consideration by the District Court.

The court did not impose a deadline for the interim hearing, did not attempt to identify who was entitled to the hearing, did not indicate whether the owner must request the hearing, and did not attempt to assign the burdens of production and persuasion at the hearing. (Pet. App. 10, 11). The Seventh Circuit explained that the hearing "should be prompt but need not be formal," and left "it to the district court to determine the notice requirement and what a claimant must do to activate the process." (Pet. App. 10). Whether a hearing must be offered in ten days, thirty days or sixty days was not decided, and could not be decided, without a fully developed record. *Id.* Nor did the Seventh Circuit decree that all property owners were entitled to a hearing. *Id.* Perhaps only innocent, car owners (those who are not themselves charged with any criminal conduct) will be entitled to a hearing, and even their right to a hearing might be regarded as waived, if they do not request the hearing.

Petitioner's claim that the hearing must be "adversarial" (Pet. Brf. 28, 46-48) also is contradicted by the Record. What the Seventh Circuit actually said was, "In short, our fresh look at this issue causes us to conclude that given the length of time . . . between the seizure of property and the opportunity for an owner to contest the seizure under DAFPA, some sort of mechanism to test the validity of the retention of the property is required." (Pet. App. 10). The court then reversed and remanded for discovery and to allow the District Court to "fashion appropriate procedural relief consistent with this opinion." *Id.*

The Seventh Circuit did not "envision lengthy evidentiary battles which would duplicate the final forfeiture hearing." (Pet. App. 10). The district court was merely directed to consider "whether a bond or an order can be fashioned to allow the legitimate use of the property while the forfeiture proceeding is pending." (Pet. App. 10). Thus, the Seventh Circuit contemplated interim, not final, relief. When, for example, the balance of the hardships favor releasing a car to an innocent owner who posts a security bond, an interim order returning the car to her pending the forfeiture trial should at least be considered. The interim hearing need not be adversarial. (Pet. App. 10,11). The burden might be assigned to the owner to present enough evidence to allow the court to conclude: (1) she has a good chance of prevailing on the merits, when the trial is held; (2) bond or other assurances are sufficient to protect Petitioner's interests; and (3) the hardship the owner will suffer without the car pending trial outweighs Petitioner's interest in retaining custody. The Seventh Circuit's order, therefore, was measured and incremental, but allowed an opportunity for early, objective review of the balance of the hardships.

2. A Valuable Property Right is at Stake

Although *Mathews* cannot be applied with precision until the facts are fully developed, a review of the *Mathews* factors proves that interim hearings are not only feasible, but that they will also benefit all concerned parties. The first *Mathews* factor addresses the private interest that is affected by the

government's action. *Mathews*, 424 U.S. at 335. All property rights are important because the right to protect property from arbitrary seizure is a central component of personal liberty. Property rights are not constitutional afterthoughts. *See* James W. Ely, *The Guardian of Every Other Right, A Constitutional History of Property Rights* (3 ed. 2007). Nor should they "be relegated to the status of a poor relation." *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994). Property provides personal security, allows for mobility, gives people the resources to order their own lives, and engenders an abiding respect for law.

In today's world, the automobile ranks among a family's most important possessions. *Krimstock*, 306 F. 3d at 61. A car certainly is as valuable, most likely much more valuable, than a stove, toaster or refrigerator, all of which have been classified important property interests that receive constitutional protection before the state may impound them. *Fuentes*, 407 U.S. at 70-71. The family car occupies a more "central place in the lives of most Americans, providing access to jobs, schools and recreation as well as to the necessities of life." *Coleman v. Wolf*, 40 F. 3d 255, 260-261 (8th Cir. 1994). As Justice Jackson once explained, the "right to drive an automobile . . . concerns . . . personal freedom as well." *Krimstock*, 306 F. 3d at 61, quoting Justice Robert H. Jackson, *The Task of Maintaining Our Liberties: The Role of the Judiciary*, 39 ABA J. 961, 963 (1953). Loss of use of the family car for even a few days represents a significant impairment of a constitutionally protected

right. *Krimstock*, 306 F. 3d at 61-63. That loss demands a prompt, post-seizure remedy that will effectively check the government's pecuniary interest in seizing as many cars as possible. *Id.*

The car owner, however, is not the only party whose welfare is affected by the months of delay between impoundment and a forfeiture trial. *Ford Motor Credit Co. v. New York City Police Department*, 503 F. 3d 186, 191, 192 (2nd Cir. 2007). Most cars are financed, and a bank or credit company holds a note, with the car as collateral. *Id.* Once the car is seized, the owner is less likely to continue paying on the note. Prolonged impoundments increase the risk of loan default by the debtor/owner. They also leave the creditor with a lien on rapidly depreciating collateral, which after a year sitting outside might well be less than the note owed to the lien holder. A prompt hearing that helps innocent owners also protects innocent lien holders from unnecessary losses.

3. The Risk of an Erroneous Deprivation Is Substantial.

Every exercise of the forfeiture power involves a risk of error. The question is: what is an acceptable risk, as compared to the probable costs of reducing the risk. A straight-forward decision, made with ample time to consider all options, by a disinterested decision maker reduces the risk of error. A decision made on the spur of the moment, by a party with a vested pecuniary interest increases the risk of error.

Any decision to file a forfeiture action is thus infected with risk at every stage.

Respondents' (Smith, Perez, and Brunston) cars were impounded based on the officers' assessment of probable cause to believe: (1) the drivers were involved in criminal activity; (2) the cars were used to facilitate the crimes; and (3) the owners, who were not present, knew about or approved of, the unlawful use of their cars. Not every police officer is an altar boy with a badge; some are willing to break the law or testify falsely to benefit themselves. Chicago Appleseed Fund for Justice, *A Report on Chicago's Felony Courts*, (2007) 76-78, http://www.chicagojustice.org/foi/documents/criminal_justice_full_report.pdf. Most, of course, are well-intentioned and strive to make correct decisions. Yet even the best-intentioned police officers must make three key determinations based on quickly evolving events.

Officers sometimes are mistaken in their belief that the driver of a car is engaged in criminal activity. In one of the very few studies of local narcotics case dispositions, a Northwestern University research team found that 58 percent were either dismissed or resulted in a finding of no probable cause at the preliminary hearing. Peter Manikus, Mindy S. Trossman & Jack C. Coppelt, *Crime and Justice in Cook County: A Report of the Criminal Justice Project*, Center for Urban Affairs Policy Research, Northwestern University (November 1989). In car impoundment cases, the police must not only observe actual criminal activity, they must also accurately

conclude that the car was used to facilitate that crime. Assuming the officer gets both of those judgments right, the officer must then decide whether the owner of the car was aware of the unlawful use. Probable cause to believe a car was used to facilitate a narcotics offense provides no useful information about innocent owners, who are neither on the scene nor involved in criminal activity in any observable way. So, putting aside the police officer's pecuniary motives, an officer's on-the-scene assessment of probable cause to impound a car is fraught with risk.

Factor in the police agency's pecuniary interest and the risk of error increases exponentially. Money is always in short supply in all police departments. Richard Miniter, *Ill-Gotten Gains*, 25 Reason 32, 34 (Aug. Sept. 1983). Police departments ratchet up forfeiture seizures to fill budget holes, when other revenue sources shrink, Donald J. Boudreaux and Adam C. Pritchard, *Civil Forfeiture and The War on Drugs: Lessons from Economics and History,* 33 San Diego L. Rev. 79, 91 (1996); Brent D. Most, Bruce L. Benson, and David Rasmussen, *Entrepreneurial Police and Drug Enforcement Policy,* 104 Pub. Choice 285 (2000). Objectivity, always difficult to maintain, is skewed by self-interest, (Eric Blumenson and Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U.Ch. L. Rev. 35, 68 (1998) that now affects a substantial majority of municipal police departments. John L. Worrall, *Addicted to the Drug War: The Role of Civil Asset Forfeiture as a Budgetary*

Necessity in Contemporary Law Enforcement, 29 J. Crim. Justice 171, 182 (2001).

Nor are prosecutors immune to budget concerns or to the opportunity to generate revenues through forfeiture proceedings. Executive Office for the United States Attorneys, U.S. Dept. of Justice, 38 United States Attorney's Bulletin 180 (1990) – ("Every effort must be made to increase forfeiture income . . . "). Petitioner, moreover, relies on the police officer's investigation to assess whether forfeiture is warranted, so Petitioner's primary source of information does not come from a disinterested civil servant. Combined, the pecuniary interests of the local police and Petitioner equal 90 percent of all forfeiture proceeds. 720 ILCS 570\505(g)(1)-(3). That means the initial decision to impound followed by the months of delay before a first court appearance is made by officials whose need to replenish their budgets tugs hard against their duty to be objective.[5] With so much at stake, the risk of error is too high to postpone objective review for many months. Therefore, the second *Mathews* factor likewise weighs heavily in favor of prompt, independent review of the impoundment decision.

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[5] *See* the Institute of Justice's amicus brief for a more in-depth discussion.

4. Petitioner's Interest Can be Accommodated.

Petitioner and amici nonetheless, cite a litany of horribles, hoping to persuade the Court that any remedy, no matter how informal and limited in scope is bound to wreak untold havoc on an otherwise fair system. (Pet. Brf., 47-52; S.G. Brf., 20-25). The current system, however, is far from fair, and Petitioner's fears are overstated and self-serving.

Petitioner and the Solicitor General claim months are needed before a hearing can be held since they must notify every owner of the proposed forfeiture. (S.G. Brf., at 20-22). This argument presupposes that every person whose property is seized is entitled to a hearing – an issue that the Seventh Circuit did not resolve. Petitioner's overbroad claim further assumes that the hearing must be held within some fixed time, another issue the Seventh Circuit did not resolve. In so doing the Petitioner and the Solicitor General prejudge the issue of what kind of notice is needed. Reasonable notice must be given, but also note that in most cases notice to the driver is sufficient, given that the driver either owns the car or knows who that owner is, and can pass that notice on. *Towers v. City of Chicago*, 173 F. 3d 619 (7th Cir. 1999). In most cases, moreover, a routine computer check of state records will identify the registered owner. *Id.* After that, written notice can be mailed to the registered owner. The City of Chicago already mails written notice to registered owners within ten days for car impoundments involving city ordinance

violations. City of Chicago, Illinois, Chicago Municipal Code 2-14-132(2). Nothing prevents Petitioner and the City from adopting a similar process in DAFPA cases.

Furthermore, innocent owners with legitimate claims will often come forward on their own. Very few people are willing to acquiesce in the loss of their car for more than a day, let alone a year or more. Petitioner and the Solicitor General thus have unduly exaggerated a legitimate concern.

With property other than cars, the interim hearing might have to proceed less expeditiously because the notice problem is likely to be more acute. However, when notice is a problem, Petitioner can alert the judge and let an objective decision maker decide on the best course of action. An occasional risk, moreover, offers no reason to delay *all* cases for months on end.

Nor is it necessary for any judge or hearing officer to routinely postpone informal but objective review for months to allow prosecutors to "coordinate" the criminal trial and the forfeiture proceeding. (S.G. at 24-26). Accused owners have a hard choice to make -- assert their right to an interim forfeiture hearing and risk cross examination or delay the interim forfeiture hearing. While the data are not known, common sense suggests that most accused\owners will opt for delay. Innocent owners will take the opposite course of action and demand a hearing. In the event a hearing is demanded and Petitioner is not

ready to proceed, scheduling adjustments and continuances are left within the sound discretion of the trial judge or administrative hearing officer.

Petitioner and the Solicitor General also mistakenly portray the Petitioner as a party who is put to unnecessary risk, if personal property is returned to the owner pending the forfeiture trial. Respondents acknowledge some risk exists. A similar, perhaps greater, risk exists every time a bail bond is posted in a criminal case, but bail is not denied as a matter of course solely to avoid the possibility that a few bad apples will abscond. Federal judges and administrative personnel already make bond determinations daily regarding forfeitable property. State judges or administrative hearing officers can be trusted to make the same determinations.

Finally, Petitioner maintains that the Seventh Circuit's order amounts to an expedited forfeiture trial. But in fact the court's order neither contemplates nor orders such relief. The court remanded this case to permit discovery, develop the facts, and then fashion an appropriate informal remedy. *Id.* The Seventh Circuit did not "envision lengthy evidentiary battles which would duplicate the forfeiture trial." (Pet. App., at 10). The form the hearing will take was not ordered and cannot be ascertained with specificity, until the facts are developed.

5. Existing Models Prove the Hearings are Feasible.

The district court's inquiry will profit from looking at models of effective interim remedies now available that do not require impounding cars for one hundred and eighty-seven days or more. The federal system allows for release of impounded property on bond. It also allows claimants to file motions for return of the property with the criminal court, an interim remedy that the DAFPA preempts.

The Civil Asset Forfeiture Reform Act (CAFRA) added a hardship provision to the federal system's already ample interim procedures. *See* 18 U.S.C. 983(f). This provision allows owners to immediately file for release of impounded property. 18 U.S.C. 983(f)(1). The claimant initiates the process by requesting release and submitting a claim that establishes her ownership interest, her ties to the community, and the circumstances that demonstrate her need for the car. 18 U.S.C. 983(f)(1)(A)-(D). The request is submitted to the appropriate agency or official, who must decide whether the owner's need outweighs the government's interest in retaining the property. 18 U.S.C. 983(f)(2). That official has fifteen days to render a decision. 18 U.S.C. 983(f)(3). If the seized property is not returned within fifteen days, the owner has the right to initiate an action in court. 18 U.S.C. 983(f)(3). And the district court must render a decision on any request for return of the property pending the trial within thirty days, unless the owner consents to more time. 18 U.S.C. 983(f)(3).

Thus, the total elapsed time from seizure to ruling on the hardship release request is forty-five days.

A similar result evolved from the *Krimstock* cases in the Second Circuit, and for the past several years New York has held hearings like those contemplated by the Seventh Circuit. Respondents are not suggesting that the ultimate determination in their case will be a mirror image of New York's *Krimstock* hearings, but New York's experience with those hearings strongly suggests that some form of timely post-seizure relief is entirely feasible. In fact, the promptness of the hearings often results in early settlement, which benefits all involved parties. *See* Gregory L. Acquaviva & Kevin M. McDonough, *How to Win a Krimstock Hearing: Litigating Vehicle Retention Proceedings Before New York's Office of Administrative Trials and Hearings,* 18 Widener L.J. 23, 80-82 (2008).

The City of Chicago also employs car impoundment procedures that afford owners the opportunity for final rulings in fifty-five days. City of Chicago Ordinance, 2-14-132. When a car is impounded by the City of Chicago for an ordinance violation, notice is given to the driver of the car, who often is the owner. *Id.* It is presumed that non-owners who are driving when the car is seized will notify the actual owner. Computerized records then enable the City to identify the registered owner, after which written notice is sent to the owner of record within ten days. *Id.* Anyone who desires a hearing has fifteen days to file a request for a hearing and a hearing is scheduled

within thirty days of the request. *Id.* Thus, the maximum elapsed time between seizure and hearing is fifty-five days.

Even though these real world examples prove that prompt hearings are feasible, the Seventh Circuit left the timing and scope of the interim hearing as well as any bond procedures unresolved, pending discovery and development of the facts. On the current undeveloped Record, it is not possible to determine precisely what form the interim hearings will take. But the federal system, New York's *Krimstock* hearings, and the City of Chicago's ordinance impound procedures prove that interim remedies are feasible.

6. Due Process Requires a Prompt Hearing Before a Neutral Decision Maker or the Opportunity to Post Bond.

The constitutional right to undisturbed use of one's property is no small matter. Respondents recognize that a wise, well-contained forfeiture system can serve the public good, so Respondents do not question the need to temporarily impound property that is deemed forfeitable. But that is just part of the story, and it is not the chapter that is now before the Court. Local authorities, with enormous pecuniary interests affecting their decisions, cannot be the sole arbiters of what property is impounded, during the months that elapse between impoundment

and a long delayed forfeiture trial. Petitioner may not be the sole judge of her own cause.

In Respondents' cases more than a year passed without an objective determination of the facts. During all of that time, Respondents never had the opportunity to tell their side of the story to a judge or administrative hearing officer. These delays, without objective review, institutionalize a system that is tainted by bias.

The burdens placed on personal property rights by the DAFPA, as it currently is applied, are too onerous and fail to provide the constitutionally necessary hearing at a "meaningful time." When that hearing should be held and what the scope of the hearing must be are questions that are best answered by *Mathews*, the Court's standard due process methodology. The Seventh Circuit properly chose *Mathews* as the due process framework and then adopted an incremental approach that directed the District Court to fashion a suitable remedy. The remedy, however, must await a full development of the facts.

CONCLUSION

For all of these reasons as well as those set forth in the Seventh Circuit's opinion and judgment, the Court should affirm.

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REPLY BRIEF

15

No. 08-351

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IN THE

Supreme Court of the United States

ANITA ALVAREZ,
State's Attorney of Cook County, Illinois,

Petitioner,

v.

CHERMANE SMITH, EDMANUEL PEREZ, TYHESHA BRUNSTON, MICHELLE WALDO, KIRK YUNKER and TONY WILLIAMS,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF

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ARGUMENT

In a civil forfeiture case, the process due is the forfeiture hearing itself. *United States v. Von Neumann*, 474 U.S. 242, 251 (1986) (holding that Von Neumann's "right to a forfeiture proceeding meeting the *Barker* test satisfies any due process right with respect to the car and the money [seized]"). The Due Process Clause does not require a separate proceeding, prior to the forfeiture hearing, to determine the reasonableness of the seizure. *Id* at 249-51; *United States v. $8,850*, 461 U.S. 555, 564-69 (1983). *See also Gelston v. Hoyt*, 16 U.S. (3 Wheat) 246, 312 (1818); *Slocum v. Mayberry*, 15 U.S. (2 Wheat) 1 (1817).[1]

Respondents disregard this authority and, moreover, play down the importance of the common law, statutory and constitutional protections that property owners have with regard to seized property. For example, in the time period post-seizure but prior to the State filing a civil forfeiture action, a property owner can seek judicial relief pursuant to the common law

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[1] In *$8,850*, this Court recognized that "[t]he *Barker* test involves a weighing of four factors: length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *$8,850*, 461 U.S. at 564. In considering this third factor, this Court observed that "[a] claimant is able to trigger rapid filing of a forfeiture action if he desires it." That is true under the federal system and is true under Illinois law, as well. If a State did not allow a claimant "to trigger rapid filing of a forfeiture action," that would likely impact the weighing of the four *Barker* factors in determining whether the State's delay in initiating civil forfeiture proceedings violated due process.

(*i.e.*, filing a *Slocum* motion asking the Court to compel the State to file a civil forfeiture action or release the property) or by statute. *See, e.g.*, 765 ILCS 1030/5 (2009) (stating that "[t]he owner or other person entitled to possession of [property that is abandoned, lost or stolen or otherwise illegally possessed] may claim and recover possession of the property . . . upon providing reasonable and satisfactory proof of ownership or right to possession"). If the seized property is the subject of a criminal prosecution and no civil forfeiture proceeding has been filed, then the property owner may petition the criminal court pursuant to Section 108-11 of the Illinois Code of Criminal Procedure, 725 ILCS 5/108-11, for the return of the property. *People v. Canady*, 49 Ill. 2d 416, 423, 275 N.E.2d 356, 360 (1971); *People ex rel. Carey v. Covelli*, 61 Ill. 2d 394, 402, 336 N.E.2d 759, 764 (1975) (same).

If a civil forfeiture proceeding has been filed, then the application of the *Barker* "speedy trial" test protects the due process rights of owners. *$8,850*, 461 U.S. at 569.[2] Once the State's Attorney files a civil forfeiture action under DAFPA, the property owner and other claimants may seek judicial relief pursuant to the Illinois Code of Civil Procedure to expedite and conclude the

[2] In *$8,850*, this Court noted that before the government filed its civil forfeiture action, the claimant failed to pursue informal remedies to secure the return of the property and, moreover, did not file a common law equitable action under *Slocum* or to file a motion under Federal Rule of Criminal Procedure 41. *$8,850*, 461 U.S. at 569. In applying the *Barker* test, this Court recognized that "[t]he failure to use these remedies can be taken as some indication that [the claimant] did not desire an early judicial hearing." *Ibid.*

forfeiture hearing. *See, e.g.*, 735 ILCS 5/2-1005 (2009) (authorizing either party to file a motion for summary judgment); and 735 ILCS 5/2-1007.1(b) (2009) (stating that "the court may, in its discretion, grant a motion for preference in setting for trial where a party shows good cause that the interests of justice will be served by granting a preference in setting for trial.") In light of these protections both before and after the filing of civil forfeiture complaints, DAFPA does not facially violate the Due Process Clause.

Respondents contend that the Due Process Clause requires an interim hearing because Section 9(J) of DAFPA provides that "for good cause shown, on a motion by the State's Attorney, the court may stay civil forfeiture proceedings during the criminal trial for a related criminal indictment or information . . ." 725 ILCS 150/9(J) (2009). (Resp. Br. 19, 23 and 36.) Of course, prior to the initiation of a forfeiture proceeding, a property owner can also move to expedite the forfeiture proceeding pursuant to *Slocum* or Section 5 of LEDPA, 765 ILCS 1030/5 (2009). In ruling on these various motions, a court ultimately must decide whether to expedite forfeiture proceedings or stay them.

Respondents seemingly ask this Court to declare that DAFPA is unconstitutional in order to ensure that they receive an expedited, adversarial hearing in which they may establish their "innocent owner" defense. The Due Process Clause, however, does not guarantee a particular result in a particular case. It simply guarantees an opportunity to be heard. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). All owners of seized property in Illinois have the

opportunity to petition a court to expedite civil forfeiture proceedings or seek the return of their property. Respondents argue that the Due Process Clause guarantees an expedited hearing. Neither case law from this Court nor the history of civil forfeiture supports this reading of the Due Process Clause.

I. Respondents' Proposed Interim Relief Places Substantial Burdens On The Judicial System But Is Designed To Benefit A Narrow Class Of Property Owners.

The structure of DAFPA provides practical benefits for both prospective claimants and the State. For example, the time schedules in DAFPA provide such claimants with an opportunity to negotiate settlements with the State. As *amicus* Women's Criminal Defense Bar Association ("WCDBA") has recognized, "the opportunity [for claimants] to be heard [and to negotiate with the State's Attorney] has produced significant results in terms of returned property." (WCDBA Br. 26.) If claimants can negotiate a settlement with the State, they need not incur the expense of hiring an attorney or the burden of going to trial. The time schedules in DAFPA also provide the police with an opportunity to complete their investigation and determine the identity of all persons with an interest in the seized property.[3]

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[3] Respondents overstate the amount of delay in DAFPA as approximately six months. (Resp. Br. 2.) So does *amicus* ACLU. (ACLU Br. 1.) This position is without merit. The parties agree that for property under $20,000.00 in value, the statute gives the seizing authority 52 days to notify the SAO and the SAO has 45 days to notify owners and all known interest holders. At that point, the owners and interest holders have all the notice they need to pursue available statutory and common law remedies to secure the return of the property.

Under Sections 4 and 6 of DAFPA, the State's Attorney provides notice to the owner of the property and all known interest holders of the property. 725 ILCS 150/4 (2009); 725 ILCS 150/6 (2009). Without a complete investigation, the notice may not reach all interest holders, including some innocent owners.

The expedited adversarial hearing that Respondents request would undermine many of the benefits of the current statutory process. If the parties have to conduct what for all practical purposes is a trial on the merits within ten days, the parties simply will have no meaningful opportunity to negotiate, as inevitably their respective positions will harden the closer they get to trial. Claimants, if they have received notice, will need to hire a lawyer for this expedited hearing. Potential claimants who have not received notice may lose an opportunity to place a claim on the seized property. Expedited hearings would begin even though the police had barely begun their investigations. The government would have to bear the expense of furnishing courts or administrative bodies to adjudicate additional adversarial hearings.

The societal costs attendant with the relief that Respondents seek is high. In their brief, Respondents acknowledge that the interim, adversarial hearing they request may not have application for all property owners. Respondents state that "[p]erhaps only innocent, car owners (those who are not themselves charged with any criminal conduct) will be entitled to a hearing." (Resp. Br. 45.) While Respondents question the ability of the police to determine whether probable cause exists to seize property, Resp. Br. 16, Respondents

do not discuss the State establishing probable cause in an interim hearing. Respondents instead argue that innocent car owners[4] should have an interim hearing to establish: (1) likelihood of success on the merits, (2) that a "bond or other assurances are sufficient" to protect the State's interests and (3) that a balancing of hardships favors the release of the car. (Resp. Br. 3, 4, 46, 48.)[5] Respondents do not discuss how their proposed interim hearing would benefit the owners of other seized property, such as cash or guns.[6]

---

[4] With regard to the "innocent owner" affirmative defense set forth in Section 8(A)91) of DAFPA, Respondents argue that Petitioner "implies that Respondents' case is governed by *Bennis v. Michigan*." (Resp. Br. 24.) Petitioner's position on *Bennis* is more correctly stated this way: if the Due Process Clause, as construed in *Bennis*, does not mandate that States provide an "innocent owner" defense, then DAFPA does not facially violate the Due Process Clause because it does not provide within ten days an adversarial hearing in which a claimant could advance an innocent owner defense.

[5] Respondents further argue that innocent owners are entitled to an immediate hearing to "prove the [seizing] officer's spontaneous judgments were mistaken." (Resp. Br. 27.) In support of this argument against any delay prior to such a hearing, Respondents ask what happens if a witness who would corroborate the submission of an "innocent owner" defense dies. (Resp. Br. 37.) Of course, this observation applies to any type of judicial proceeding, ranging from a hearing on a motion to suppress to a trial on the merits. Under Respondents' logic, all evidentiary hearings would need to be expedited.

[6] In this regard, *Krimstock* does not focus on cash or guns but rather on three concerns regarding civil forfeiture of automobiles: (1) delay, (2) the impact of forfeiture on innocent owners of automobiles and (3) the lack of available remedies (Cont'd)

Respondents, therefore, request an expedited, adversarial hearing ten days after seizure that the Constitution does not require but that needlessly burdens all claimants, the police, the State and the court system. Respondents ask for this relief purportedly to help innocent owners of automobiles seized pursuant to DAFPA. The common law, Illinois statutes and informal procedures under DAFPA already protect the rights of such property owners and provide them with an avenue to seek judicial relief for undue delay, regardless of whether the State has filed its forfeiture complaint. Respondents, it seems, would have this Court mandate an additional hearing that would burden all owners of forfeited personal property but would help only a narrow class of car owners who already have legal remedies at their disposal. To borrow a phrase from Justice Frankfurter, Respondents propose "to burn the house to roast the pig." *Butler v. Michigan*, 352 U.S. 380, 383 (1957). The Due Process Clause does not mandate such a result.[7]

(Cont'd)

under the challenged New York ordinance. Gregory L. Acquaviva and Kevin M. McDonough, How To Win A *Krimstock* Hearing: Litigating Vehicle Retention Proceedings Before New York's Office of Administrative Trials and Hearings, 18 Widener L.J. 23, 39-41 (2008).

[7] WCDBA argues that other Illinois forfeiture statutes provide for preliminary hearings to determine probable cause. (WCDBA Br. 29, n. 17.) WCDBA, however fails to state that in these statutes, the finding of probably cause is a prerequisite to the State obtaining a restraining order, injunction, prohibition, lis pendens or other extraordinary relief in connection with the property subject to forfeiture. In this respect, the Illinois statutes that WCDBA cites are distinguishable from DAFPA and are inapposite to the appeal.

II. Respondents' "Improper Motive" Argument Lacks All Merit.

Throughout the history of civil forfeiture, the beneficiary of forfeited property was always the government. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680-81 (1974). This does not invalidate civil forfeiture statutes or make them constitutionally suspect.

Nonetheless, Respondents and various *amici* argue that the desire for revenue is the driving force in civil forfeiture litigation. *See, e.g.*, Resp. Br. 7, 9, 14-16, 36-37 and 50; Nat'l Police Accountability Project ("NPAP") Br. 6-7 and 23; Inst. For Justice Br. 17-25 and 33-37; and Cato Br. 6, 11 and 32-35. In advancing this argument, Respondents and *amici* argue that law enforcement has improper motives with respect to the initiation of civil forfeiture proceedings. Nothing in the record remotely suggests that the Petitioner or the City of Chicago defendants below had any such motives.[8]

[8] *Amicus* Cato Institute, Goldwater Institute Scharf-Norton Center for Constitutional litigation and Reason Foundation (collectively "Cato") cites a newspaper article discussing a scandal in Tenaja, Texas in which local police were accused of stopping black motorists due to their race and seizing their cars. (Cato Br. 24-25.) Petitioner shares Cato's indignation at such an unjustified abuse of power. This story, however, is not germane to this appeal for two reasons. First, the alleged discriminatory practices of a local government in Texas are simply not relevant to the issue of whether DAFPA is facially unconstitutional. Second, the remedy for the conduct alleged to have occurred in Texas is a *Monell* claim alleging invidious discrimination and violations of the Equal Protection Clause. Respondents here have not alleged that DAFPA discriminates on the basis of race, gender, national origin or on any other basis.

In this regard, Respondents invoke the Latin phrase "*Nemo iudex in sua causa*," Resp. Br. 6, and accuse Petitioner of attempting to be "the judge in her own cause." This maxim has no application here, as the State's Attorney has never contended that she should be the final arbiter regarding the disposition of seized property. It is, instead, the judicial branch that ultimately must decide whether to stay a forfeiture proceeding for good cause, whether to compel the State to initiate forfeiture proceedings or release the property and whether to sustain a claimant's "innocent owner" defense.

Furthermore, when a local government seizes property, such as cash, pursuant to DAFPA, that cash is placed in a bank account. The existence or non-existence of an interim hearing within ten days of seizure of such cash is completely unrelated to the distribution of seized cash to various governmental bodies in the event that the State prevails in the forfeiture hearing. Respondents simply do not explain why an interim hearing would combat the alleged improper motives of seizing authorities and law enforcement in civil forfeiture cases. Without expressly saying so, Respondents seemingly call for an additional layer of process to civil forfeiture litigation to disable the government's ability to prosecute forfeiture complaints. If the seizing authority is not given time to conduct a proper investigation, the State's ability to prosecute any case, including forfeiture cases, is undermined.

III. DAFPA Does Not Preempt Common Law and Other Statutory Remedies of Property Owners.

Respondents acknowledge that property owners have a common law right to seek judicial relief regarding a delay in the initiation of civil forfeiture hearings (*i.e.*, the owner may ask the court to compel the State to initiate a civil forfeiture hearing or release the property). Respondents inaccurately characterize this equitable remedy (discussed in *Slocum* and *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276 (1855)) as a motion for "interim" relief. (Resp. Br. 27-30.) Such relief is not interim (*i.e.*, temporary or short-term) in the way that a *Gerstein* hearing is. *See Gerstein v. Pugh*, 420 U.S. 103 (1975). To the contrary, *Slocum* recognizes that property owners have a common law right to ask the court to compel the State to start the forfeiture proceeding or release the property.

A. DAFPA Does Not Preempt The Common Law Right To Seek Judicial Redress Recognized in *Slocum*.

Respondents argue that Section 9(J) preempts the common law property right to equitable relief recognized in *Slocum*.[9] 725 ILCS 150/9(J) (2009). It does not.

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[9] Petitioner's position regarding the equitable relief recognized in *Slocum* was not taken at the proverbial "eleventh hour" in this litigation, as Respondents contend. (Resp. Br. 41.) Respondents filed an "as applied" challenge to DAFPA. (Joint App. 32a, 33a and 38a.) In the district court, Petitioner moved for dismissal based upon *Jones v. Takaki*, 38 F.3d 321 (7th Cir. 1994). (Joint App. 67a, 71a and 72a.) The district court dismissed

(Cont'd)

Moreover, Respondents' proposed reading of Section 9(J) has no basis in the plain language of the statute and is contrary to the applicable rule of statutory construction in Illinois: statutes in derogation of the common law must be strictly construed. *Summers v. Summers*, 40 Ill. 2d 338, 239 N.E.2d 795 (1968).

Section 9(J) states, in part, that property subject to forfeiture "shall not be subject to return or release by a court exercising jurisdiction over a criminal case involving the seizure of such property unless such return or release is consented to by the State's Attorney." 725 ILCS 150/9(J) (2009). This provision concerns the administration of seized property where the property is subject to hearings in multiple courts (*i.e.*, a court hearing a criminal prosecution and a court hearing the civil forfeiture case). In contrast, *Slocum* recognizes the right of a property owner to ask a court to compel the State to either proceed with a civil forfeiture proceeding or release the property. *Slocum*, therefore, addresses

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(Cont'd)

Respondents' complaint. (Pet. App. 12a.) On appeal, Petitioner argued that *Jones* was correctly decided and that the district court should be affirmed. The Seventh Circuit ruled that DAFPA facially violated the Due Process Clause. (Pet. App. 8a.) Petitioner has subsequently argued to this Court that unlike the opinion below and *Krimstock v. Kelly*, 306 F.3d 40 (2nd Cir. 2002), *Jones* properly followed *$8,850* and *Von Neumann*. In advancing this argument, Petitioner has relied upon the common law history of civil forfeiture and precedent from this Court, such as *Slocum* and *Gelston*, recognizing the common law right of property owners to seek equitable relief to compel a forfeiture hearing or a release of the seized property. Petitioner was not dilatory in presenting such authority.

the issue of when the civil forfeiture case will proceed, if at all. Section 9(J) does not.

Consequently, Section 9(J) and *Slocum* do not conflict, as they address wholly separate issues. In fact, nothing in DAFPA limits or extinguishes the equitable relief recognized in *Slocum*. In Illinois, "statutes in derogation of common law are to be strictly construed and nothing is to be read into such statutes by intendment or implication." *Summers*, 40 Ill. 2d at 342, 239 N.E.2d at 798. Under Illinois law, a statute in derogation of the common law cannot be construed as changing the common law beyond what the statutory language expresses or is necessarily implied from what is expressed. *Williams v. Manchester*, 228 Ill. 2d 404, 419, 888 N.E.2d 1, 10 (2004).

Here, DAFPA does not modify or otherwise conflict with the common law right recognized in *Slocum*. In fact, the Illinois General Assembly enacted LEDPA, which authorizes a property owner, where property was seized but no forfeiture action is pending, to claim and recover possession of property that the government possesses. *See* 765 ILCS 1030/5 (2009).

Neither DAFPA nor any other Illinois statute preempts *Slocum*.

B. Respondents Do Not Recognize The Full Scope Of LEDPA.

Respondents incorrectly argue that LEDPA applies only to property that has been lost or abandoned. (Resp. Br. 41.) This statute also applies to property that is

"stolen or **otherwise illegally possessed**." 765 ILCS 1030/1 (2009) and 765 ILCS 1030/2 (2009) (emphasis added). An allegation that a person illegally possesses property is at the heart of the "innocent owner" affirmative defense.

Respondents also argue that *People v. Moore*, 410 Ill. 241, 102 N.E.2d 146 (1951) and *People v. Kapande*, 23 Ill. 2d 230, 177 N.E.2d 825 (1961) are inapposite because they pre-date DAFPA, Resp. Br. 42-43, but that argument misses the mark. *Moore* and *Kapande* merely show that the common law right to demand the return of seized property is recognized in Illinois.

IV. Respondents' Position Cannot Be Reconciled With *Slocum*.

A. *Slocum* Compels Reversal Of Decision Below.

Respondents admit that at common law, property owners have the right to ask the State to initiate civil forfeiture proceedings or release the property. (Resp. Br. 27-30.) Like the cargo owner in *Slocum*, Respondents sought judicial relief regarding an undue delay in the resolution of a civil forfeiture proceeding in the wrong court. In *Slocum*, the federal courts had exclusive jurisdiction over the civil forfeiture action but the cargo owner sought judicial relief (a *replevin* action) regarding the delay in initiating civil forfeiture proceedings in a Rhode Island state court. *See Slocum*, 15 U.S. at 14 ("[t]he common law courts of the United States have no jurisdiction in the case. They can afford him no relief.")

The present case presents the exact opposite jurisdictional scenario from *Slocum*: Illinois had exclusive *in rem* jurisdiction over the subject property but the respondents sought judicial relief in federal court. Under *Slocum*, Respondents should have sought judicial relief in the Illinois courts if they wanted to ask a court to compel the State to initiate civil forfeiture proceedings or return the property.

B. Illinois Law Provides Property Owners And Prospective Claimants With A Mechanism For Expediting The Judicial Process In Civil Forfeiture Cases.

$8,850 and *Von Neumann* show that the process due here is the civil forfeiture hearing itself. Respondents' argument to the contrary, Resp. Br. 29, cannot be reconciled with this line of cases. In addition, Respondents argue that "[n]either *$8,850* nor *Von Neumann* addressed the use of interim remedies" and that Respondents "never requested dismissal of the forfeiture charges or any other relief that would affect the speedy disposition of the forfeiture proceedings." (Resp. Br. 32, 33, 39; *see also* ACLU Br. 13.) This is not a fair reading of *$8,850*, *Von Neumann* or *Slocum*.

Under *Slocum* and *Gelston*, a property owner seeking equitable relief to compel the initiation of a civil forfeiture hearing does not strictly request dismissal. The owner instead asks the court to compel the State to go forward with the civil forfeiture action or, alternatively, to return the property. In this regard, Respondents' position is somewhat disingenuous. Respondents say that they do not seek dismissal but

they ignore the obvious: if the State cannot establish probable cause or if an owner can establish the innocent owner defense at the interim hearing that Respondents seek, then the forfeiture action is over and the property is returned.

Without saying so, Respondents essentially ask this Court to overrule *$8,850* and *Von Neumann*. (Resp. Br. 34-37.) In this regard, Respondents argue that application of the *Barker* speedy trial test does not adequately protect their due process rights because Section 9(J) allows "good cause continuances while the criminal case is pending." (Resp. Br. 36). Section 9(J) certainly allows the State's Attorney to move for a stay. But *Slocum* authorizes owners or other persons with an interest in the property to compel a forfeiture proceeding or release the property. LEDPA authorizes a property owner to move for the return of wrongfully seized property. With regard to any such motions, a court ultimately would have to decide what to do.

Respondents further contend that they are powerless to compel a prosecutor to perform discretionary acts and, as a result, the *Slocum* common law equitable remedy provides no actual relief. (Resp. Br. 43.) Respondents' analysis rests on a faulty understanding of *Slocum*. Indeed, the common law equitable remedy from *Slocum* is not to compel a prosecutor to take a particular action, but instead to inform the State that it had to choose whether to prosecute the forfeiture or release the property. In this sense, the equitable remedy from *Slocum* is analogous to the statutory speedy trial guarantee in Illinois.

See, e.g., 725 ILCS 5/103-5 (2009) (mandating that the State choose whether to try an individual within 120 days from the date he was taken into custody or, alternatively, release him).

Respondents challenge Petitioner's reliance on *Slocum* and contend that Petitioner has "misidentifie[d] the relevant common law and early colonial practices," thus rendering her argument that the forfeiture hearing itself is all that is required by the due process clause "unquestionably false." (Resp. Br. 27, 29.) To support their claim that the historical practices provided the right to "immediate judicial review" following a seizure by the government for forfeiture purposes as well as the opportunity to post bail for the property, Respondents cite *Slocum* and *Murray's Lessee*. Neither decision stands for the proposition offered by Respondents.

First, as explained above, *Slocum* made clear that while a claimant to the property has the right to avoid an unreasonable delay by asking the court to either compel a prosecutor to institute the forfeiture proceedings or to release the property, the claimant may not attempt to litigate the validity of the seizure in a separate proceeding or before a separate tribunal. 15 U.S. at 10. As the Court explained, "it depends upon the final decree of [the forfeiture court] whether such seizure is to be deemed rightful or tortious." *Ibid.* See also *Gelston*, 16 U.S. at 312 ("The decree of the [forfeiture] court acts upon the thing in controversy, and settles the title of the property itself, the right of seizure, and the question of forfeiture.")

Similarly, although *Murray's Lessee* addressed the constitutionality of a statute authorizing the Treasury Department to issue distress warrants which empowered a United States Marshal to seize the real and personal property of a customs collector who had been delinquent in turning over the funds to the federal government, and to sell that property in satisfaction of the debt, it did not in any way declare that due process requires the opportunity to post "security" in order to retrieve property seized by the government. (Resp. Br. 28.) Rather, in holding that the statute comported with the Due Process Clause of the Fifth Amendment, the Court noted that "there has been no period, since the establishment of the English monarchy, when there has not been, by the law of the land, a summary method for the recovery of debts due to the crown" (59 U.S. at 277), and the fact that Congress had provided for judicial oversight and bail was a legislative choice which was not required by the constitution. *Id.* at 285.

Thus, contrary to Respondents' claims, the historical record supports Petitioner's arguments that the Due Process Clause does not require an adversarial "postseizure/preforfeiture" hearing to test the validity of the seizure and provide for release on bond of the seized property. Of course, some states specifically provide for such a hearing by statute. See Arizona Rev. Stat. § 13-4310; Fla. Stat. 932.703(2)(a). But other states, like Illinois, and the Federal Government have chosen less formal solutions for addressing concerns over unreasonable delay in conducting the forfeiture proceedings. (*See* National Ass'n of Counties Br. 22.) "To suddenly constitutionalize this area would short-circuit what looks to be a prompt and considered

legislative response . . . [because] 'judicial imposition of a categorical remedy . . . might pretermit other responsible solutions being considered in Congress and state legislatures'." *District Attorney's Office v. Osborne*, __ U.S. __, 129 S. Ct. 2308, 2322 (2009) (quoting *Murray v. Giarratano*, 492 U.S. 1, 14 (1989) (Kennedy, J., concurring in judgment)).

V. Respondents' Argument Regarding "Passing On" Notice To Innocent Owners Is Legally Untenable.

Respondents argue that "[r]easonable notice must be given but also note that in most cases notice to the driver is sufficient, given that the driver either owns the car or knows who that owner is, and can pass that notice on." (Resp. Br. 52.) This argument is legally groundless. It is the height of irony for Respondents to suggest that the government could simply rely on the driver of a seized vehicle to pass notice on to the owner of the car. Respondents do not explain how such a procedure satisfies due process. The driver is not the agent of the State and, thus, the State could not simply assume that the driver would pass on such notice. Moreover, Respondents cannot seriously expect the driver of a seized automobile to pass on notice to all persons with a property interest in the car, such as a car finance company. The State's Attorney has to notify the owner and all known persons with an interest in the property. Without a proper investigation, the State's Attorney cannot give notice to all persons with a property interest in the seized property.

Respondents concede the risks associated with insufficient notice, particularly with property other than

automobiles. (Resp. Br. 53.) Respondents also concede that some risk exists with the concept of bonding out forfeited property. (Resp. Br. 53-54.) Respondents, however, argue that the same risk exists when a person charged with a crime posts bail. There are two problems with this argument. First, persons charged with crimes have a constitutional right to ask for a bail bond. *See* U.S. Const., Eighth Amendment. Second, no such right exists for property and, in any event, personal liberty is not the equivalent of personal property.

If innocent owners do not get notice of the forfeiture of their property, they cannot meaningfully assert their property rights. *Mullane*, 339 U.S. at 314 (the "right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest"). Respondents cite *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) for the proposition that "due process demands a hearing 'at a meaningful time and in a meaningful manner.'" (Resp. Br. 15.) Respondents' citation to *Armstrong* is ironic because the interim hearing they propose undermines the State's ability to provide adequate notice to innocent owners. The concept of having an interim hearing that essentially duplicates the forfeiture hearing itself — when the police have barely begun their investigation — leaves innocent owners in a precarious position. If such innocent owners have not received notice, they cannot participate in Respondents' proposed "interim" hearing and, thus, could be denied the opportunity to participate "at a meaningful time and in a meaningful manner." *Armstrong*, 380 U.S. at 552.

VI. The Due Process Clause Does Not Mandate That DAFPA Provide An Interim, Administrative Adversarial Hearing.

DAFPA balances the rights of government with those of claimants of seized property, including those claiming to be innocent property owners. The fact that DAFPA does not provide an interim hearing that duplicates the civil forfeiture hearing does not violate the Due Process Clause.

A. The "Interim" Relief That Respondents Request Is Interim In Name Only.

Respondents argue that the interim hearing that the Seventh Circuit contemplated is not an adversarial one. (Resp. Br. 45.) It is. In this regard, the Seventh Circuit substituted its judgment for the judgment of the Illinois General Assembly with regard to the time necessary to conduct the civil forfeiture hearing itself. The Seventh Circuit's view was not, as respondents argue, "a cautious and incremental step." (Resp. Br. 12.)

Amicus ACLU argues that the preliminary hearing that the Seventh Circuit outlined does not replicate the civil forfeiture hearing itself because the court stated that this hearing "need not be formal" and did not set a "specific time frame" for the hearing. (ACLU Br. 9.) However, Respondents asked in their complaint that this preliminary hearing be held within ten days of seizure. (Joint App. 36a.) Moreover, the Seventh Circuit stated that "[a]ll in all, we agree with *Krimstock*." (Pet. App. 8a.) The Seventh Circuit also cited with approval interim, adversarial forfeiture hearings that are statutorily provided in Florida and Arizona. (Pet. App. 9a.)

It certainly appears the Seventh Circuit contemplated the imposition of *Krimstock*-style hearings that replicate those conducted in New York City. *Krimstock* hearings are, for all practical purposes, the equivalent of a trial on the merits.[10] *Amicus* Cato "wonder[ed] why [Petitioner does] not discuss the actual workings of the *Krimstock* hearing in New York City since that would presumably provide the best evidence that such hearings are burdensome to law enforcement." (Cato Br. 16.) In fact, the procedures used in *Krimstock* hearings, as set forth in OATH's website[11] show that interim *Krimstock* hearings are adversarial proceedings that duplicate the civil forfeiture hearing itself.

The interim *Krimstock* hearings in New York have all the characteristics of an adversarial hearing on the merits under Section 9 of DAFPA. *See generally* Acquaviva, 18 Widener L.J. 23 (2008). In *Krimstock* hearings, the New York Police Department has the duty to provide such notice on two occasions: (1) in person, at the time the vehicle is seized and (2) by mail to the registered or titled owner within five business days of the seizure. Acquaviva, 18 Widener L.J. at 46. If the property owner alleges inadequate notice, the burden shifts to the department to prove its compliance with the notice requirements. *Id.*

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[10] *See* the flowchart for *Krimstock* hearings that New York's Office of Administrative Trials and Hearings ("OATH") has placed on its website. *See* http://www.nyc.gov/html/oath/pdf/Eng_Pamphlet.pdf and the attached appendix.

[11] *See* http://www.nyc.gov/html/oath/html/forfeiture.html (last visited on August 28, 2009).

Once a property owner has requested a hearing,[12] the police department must respond in two business days and hold an interim *Krimstock* hearing within ten business days. *Id.* at 52. Those time limits are strictly enforced and OATH and in *Police Department v. Manning,*[13] OATH rejected the Police Department's argument that settlement negotiations tolled the ten business day period. Acquaviva, 18 Widener L.J. at 52.

OATH's website candidly acknowledges that a *Krimstock* hearing is similar to a trial:

> The hearing at OATH is similar to a court trial. You can have a lawyer or non-lawyer representative. Both sides can make opening statements, present evidence, call witnesses to testify, and make closing statements.

See http://www.nyc.gov/html/oath/html/forfeiture.html. OATH sets forth the following items on which the government bears the burden of proof: (1) probable cause, (2) the government is likely to prevail on the merits, (3) no heightened risk to the public and (4) if the owner raises the "innocent owner" defense, the State must prove, by a preponderance of evidence, that

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[12] The right to request a *Krimstock* hearing serves the same goal as procedures that already exist in Illinois law: the property owner's right to ask the Court to compel the State to initiate a civil forfeiture proceeding or, where a forfeiture case is already pending, the right to ask the Court to expedite the forfeiture hearing itself.

[13] *Police Dep't v. Manning*, OATH Index No. 1162/05 (OATH Jan. 25, 2005).

the vehicle's owner is not entitled to relief. *Id.* To meet its burden where the claimant raises the innocent owner defense, the police "must prove that the claimant 'permitted or suffered' the illegal use of the vehicle. The 'permitted or suffered' standard is fulfilled where the alleged innocent owner 'knew or should have known that the car would be used as the instrumentality of or in furtherance of a crime.'" Acquaviva, 18 Widener L.J. at 71. The observation of *amicus* Legal Aid Society that "[s]ome vehicle claimants have prevailed by presenting credible testimony that rebuts the assertions in police documents" demonstrates the adversarial nature of *Krimstock* hearings. (Legal Aid Soc. Br. 21.)

At the conclusion of the *Krimstock* hearing, the OATH judge will issue a decision within three business days. The losing party may then appeal the OATH judge's decision to the trial court.[14] The *Krimstock* hearing does not resemble a true interim hearing, such as a *Gerstein* hearing under the Fourth Amendment, but rather an administrative hearing[15] on the merits that can be appealed through the state court system. These administrative hearings can only be described as adversarial. Respondents' position to the contrary strains all credibility.

Amicus ACLU concedes that "[i]f the preliminary hearing[s] in the present case were merely an attempt to speed up the forfeiture hearing, one could more

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[14] *See* http://www.nyc.gov/html/oath/html/forfeiture.html.

[15] *Amicus* Legal Aid Society acknowledges that *Krimstock* hearings have "been institutionalized for more than five years at a city administrative tribunal." (Legal Aid. Soc. Br 1.)

readily appreciate the argument that *$8,850* should guide the Court's decision here." (ACLU Br. 14.) The preliminary hearing that Respondents propose is exactly that and *$8,850* should be controlling.

B. *Gerstein* Is Not Analogous To The Present Case.

Respondents argue that the Fourth Amendment requires a "prompt, post-seizure hearing." (Resp. Br. 21.) *Amici* WCDBA and NPAP argue that a *Gerstein* hearing under the Fourth Amendment is analogous to the hearing that Respondents seek in this case. (*Amici* WCDBA Br. 7-13, 16-17; NPAP Br. 31-35.) It is not.

As an initial matter, Section 9(G) of DAFPA requires that the State establish probable cause.[16] This satisfies the Fourth Amendment. Respondents' true complaint in this case is delay in being able to advance an innocent owner defense. The potential for undue delay is an issue that raises concerns under the Due Process Clause. *See $8,850*, 461 U.S. at 562-563 (determining "when a post-seizure delay may become so prolonged that the dispossessed property owner has been deprived of a meaningful hearing at a meaningful time" in violation of the Due Process Clause). A *Gerstein* hearing simply does not solve the delay problem that Respondents have raised.

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[16] *Amicus* Cato criticizes the fact that Section 9(G) allows the State to introduce hearsay evidence into evidence when establishing probable cause. (Cato Br. 31.) This criticism, however, is beyond the scope of the question presented in this appeal.

Furthermore, *Gerstein* hearings are not adversarial. Respondents, however, seek an adversarial hearing where the State has to establish probable case and where a property owner may assert an affirmative defense (*i.e.*, submit proof that he or she is an innocent owner). The comparison to *Gerstein* is not apt. *Amicus* WCDBA argues that if the Fourth Amendment requires a *Gerstein* hearing prior to extended detention of a person after an arrest, the Fourth Amendment also requires an, interim probable cause hearing immediately after the seizure of personal property. (WCDBA Br. 12-13.) This analogy fails, as *Gerstein* does not address the concerns about delay attendant with the seizure of property. Those concerns raise issues under the Due Process Clause, not the Fourth Amendment. This Court has recognized that:

> *Gerstein* and *Graham v. Connor*, 490 U.S. 386 (1989) concerned not the seizure of property but the arrest or detention of criminal suspects, subjects we have considered to be governed by the provisions of the Fourth Amendment without reference to other constitutional guarantees. In addition, also unlike the seizure presented by this case, the arrest or detention of a suspect occurs as part of the regular criminal process, where other safeguards ordinarily ensure compliance with due process . . . Neither *Gerstein* nor *Graham*, however, provides support for the proposition that the Fourth Amendment is the beginning and end of the constitutional inquiry whenever a seizure occurs.

United States v. James Daniel Good Real Property, 510 U.S. 43, 50 (1993).

Respondents have requested an order mandating an interim hearing similar to the *Krimstock* hearings. *Krimstock* hearings are adversarial hearings with opening statements, the introduction of evidence, cross-examination, closing arguments and administrative review. *Krimstock* hearings could hardly be more dissimilar to *Gerstein* hearings. It would be completely incongruous to hold that the detention of a person mandates a non-adversarial, *Gerstein* hearing but the detention of personal property mandates what amounts to an immediate trial.

C. Respondents' Garnishment Cases Do Not Mandate The Imposition Of An Immediate, Adversarial Hearing In Civil Forfeiture Cases.

A garnishment statute provides a judgment creditor with a means of obtaining the property of a judgment debtor from a third-party in order to satisfy a debt or judgment. *See, e.g., Wash. State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 383 (2003) (recognizing that garnishment is a "judicial proceeding in which a creditor (or potential creditor) asks the court to order a third party who is indebted to or is bailee for the debtor to turn over to the creditor any of the debtor's property"). The role of a bailee in a garnishment case is wholly distinguishable from the role of the State in a civil forfeiture proceeding. As a result, Respondents' reliance on *North Georgia Finishing v. Di-Chem*, 419 U.S. 601 (1975), Resp. Br. 19-20 and 39, is misplaced.

In *North Georgia*, a bank account "was impounded and, absent a bond, put totally beyond use during the

pendency of the litigation on the alleged debt, all by a writ of garnishment issued by a court clerk without notice or opportunity for an early hearing and without participation by a judicial officer." *North Georgia*, 419 U.S. at 606.

North Georgia is not analogous to the present case. Unlike the bank in *North Georgia* (which did not have a property interest in the bank account or the alleged debt), the State has an interest in seized property. Property interests "are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972).

Under Illinois law, title to forfeited property vests with the State upon commission of the illegal act. *See* 725 ILCS 150/9(K) (2009); *accord United States v. Stowell*, 133 U.S. 1 (1890). Such property remains forfeited unless a claimant can establish an exemption under Section 8 of DAFPA. 725 ILCS 150/8 (2009). In other words, the seizure of forfeited property essentially places a cloud on the title of that property and a claimant may only remove this cloud by establishing an exemption. Significantly, the State's property right is rooted in the enforcement of its criminal laws: the State wants to stop the use of property (*i.e.*, money, guns, yachts, cars, *etc.*) in the commission of drug offenses. The State's interest in seized property is not, as *amicus* Institute for Justice argues,[17] minimal.

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[17] Inst. For Just. Br. 37-38.

Furthermore, DAFPA preserves the *status quo* regarding the transfer or dissipation of seized property. The court in *North Georgia* did not preserve the *status quo*; it changed it by putting the property totally beyond use.

In sum, the State's rights in a garnishment case are simply not the same as the State's rights in a civil forfeiture case. *North Georgia* does not concern civil forfeiture and is inapposite. Respondents' argument that *Barker* is not reconcilable with *North Georgia*, Resp. Br. 38, is without merit.

VII. Under Either The *Barker* "Speedy Trial" Test Or *Mathews*, DAFPA Does Not Violate The Due Process Clause.

Respondents contend that Petitioner has "sidestepped" the Government's "concession" that *Mathews v. Eldridge*, 424 U.S. 319 (1976), rather than *Barker*, applies to the question of determining when a postseizure hearing must be held. (Resp. Br. 27.) Such an assertion is blatantly wrong where the United States made no such concession (*see* United States Br. 8) ("This Court has considered that question in a number of cases, including *$8,850*. But even if the same question were considered afresh under *[Mathews]*, the outcome would be no different."), and where Petitioner specifically argued in her brief that "even if *Mathews* rather than *Barker* provides the appropriate analytical framework for addressing these issues, the Seventh Circuit still erred in ruling that DAFPA violated the Due Process Clause." (Pet. Br. 45)

Moreover, although the "flexible" *Barker* test is preferable since it is applied on an "ad hoc basis" and therefore compels analysis of the particular circumstances of each case to determine if a person's rights have been unduly prejudiced (see *Vermont v. Brillon*, __ U.S. __, 129 S. Ct. 1283, 1290-91 (2009) (quoting *Barker*, 407 U.S. at 530))[18], the "categorical" *Mathews* rule (Resp. Br. 39) does not require a contrary conclusion as an application of the three *Mathews* factors demonstrates that DAFPA is constitutional even though it does not expressly provide for interim relief.

First, as stated in Petitioner's opening brief, the "private interest" at issue in this case is the "loss of the use of a car or money for approximately three months while the police and the State's Attorney decide whether or not to institute statutory forfeiture proceedings." (Pet. Br. 45) However, as this Court recognized in *City of Los Angeles v. David*, 538 U.S. 715, 717-18 (2003) (*per curiam*), the loss of the use of money for a period

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[18] *Amicus* ACLU criticizes the ad hoc approach of *Barker* precisely because it is flexible and requires a case-by-case analysis. (ACLU Br. 17-20.) Respondents advance the same criticism. *See* Resp. Br. 40 (characterizing the case-by-case approach that *Barker* offers as "wishy-washy"). *Amicus* WCDBA criticizes *Barker* as being too "binary" and too focused upon delay. (WCDBA Br. 32.) These criticisms are misguided, however, as "due process is flexible," *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972), and the *Barker* test considers length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant. *$8,850*, 461 U.S. at 564. The flexible approach of *Barker* properly focuses upon the facts and circumstances of each case to determine whether a particular claimant or owner has been unduly prejudiced.

of time is not as significant of a loss as the temporary deprivation of a job or the use of an automobile. Similarly, in *Von Neumann*, this Court specifically rejected the argument that the temporary loss of the use of an automobile while forfeiture hearings are being contemplated constitutes a "special hardship." *Von Neumann*, 474 U.S. at 249-51. Thus, just because a temporary deprivation of an automobile works a more serious harm than the loss of the use of money, it does not mean that the private interest in this case so overwhelms the government's interest. This is even more compelling in the forfeiture context, where the government has a protectable interest in the property itself, *see* 725 ILCS 150/9(K) (2009), and is not simply holding the property until a particular fee or fine is paid.

Similarly, the second factor, "the risk of an erroneous deprivation of such interest through the procedures used" (*Mathews*, 424 U.S. at 335), does not support Respondents' arguments. As argued above, the interim hearing anticipated by Respondents would be nothing more than a highly expedited version of the statutory forfeiture hearing. However, nowhere in Respondents' brief do they assert that the forfeiture hearing itself is an insufficient mechanism for protecting against erroneous seizure. Nor could they, as it is the prosecution's burden at that hearing to establish probable cause for the seizure, just as it would be at the proposed interim hearing.

Finally, as to the third factor, the government's interest falls squarely against Respondent's arguments. As *Mathews* itself recognized, this factor necessarily includes not only the "function involved," but also

"the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews*, 424 U.S. at 335. Respondents claim that such interim proceedings are "feasible" (Resp. Br. 54), but completely ignore the fact that "the administrative resources available to modern police departments are not limitless." *City of Los Angeles*, 538 U.S. at 718. As this Court acknowledged, it "takes time to organize hearings: there are only so many courtrooms and presiding officials" and "the city may have to find a substitute to cover [the seizing] officer's responsibilities while he attends the hearing." *Ibid.*

Similarly, this Court has long recognized that a prosecutor has a legitimate interest in delaying a prosecution until she is satisfied that the investigation is complete, even if it could prejudice the defendant's right to defend himself. See *United States v. Lovasco*, 431 U.S. 783, 790 (1977) ("[T]he Due Process Clause does not permit courts to abort criminal prosecutions simply because they disagree with a prosecutor's judgment as to when to seek an indictment."). As the Court explained:

> From the perspective of law enforcement officials, a requirement of immediate prosecution upon probable cause is equally unacceptable because it could make obtaining proof of guilt beyond a reasonable doubt impossible by causing potentially fruitful sources of information to evaporate before they are fully exploited. And from the standpoint of the courts, such a requirement is unwise because it would cause scarce resources to be consumed on cases that prove

> to be insubstantial, or that involve only some of the responsible parties or some of the criminal acts. *Thus, no one's interests would be well served by compelling prosecutors to initiate prosecutions as soon as they are legally entitled to do so.*

Id. at 792 (emphasis added) (footnotes omitted).

Similarly, the Court noted that expediting the process could actually harm the suspect's interests because "requiring the Government to make charging decisions immediately upon assembling evidence sufficient to establish guilt would preclude the Government from giving full consideration *to the desirability of not prosecuting in particular cases.*" *Id.* at 794 (emphasis added). Accordingly, the Court concluded that:

> In our view, investigative delay is fundamentally unlike delay undertaken by the Government solely "to gain tactical advantage over the accused," *United States v. Marion*, 404 U.S. at 324, precisely because investigative delay is not so one-sided. Rather than deviating from elementary standards of "fair play and decency," a prosecutor abides by them if he refuses to seek indictments until he is completely satisfied that he should prosecute and will be able promptly to establish guilt beyond a reasonable doubt. Penalizing prosecutors who defer action for these reasons would subordinate the goal of

> "orderly expedition" to that of "mere speed," *Smith v. United States*, 360 U.S. 1, 10 (1959). This the Due Process Clause does not require.

Id. at 795-96.

Thus, because Petitioner has a significant interest in completing the investigation *before* she litigates the propriety of the initial seizure and potential for forfeiture, as well as a compelling interest in protecting the property from destruction or disappearance while that investigation continues (*see Good*, 510 U.S. at 57), the government's interest outweighs Respondents' interest in the property while that investigation is conducted.[19]

VIII. Respondents Could Have But Did Not Exercise Available Remedies That Could Have Expedited Their Civil Forfeiture Cases.

Respondents argue that the "interim remedies Petitioner belatedly cites were not available to Respondents." (Resp. Br. 44.) That is simply not true with respect to the right of claimants to contact the State's Attorney, *see* Section 6(C) of DAFPA, or with respect to available common law or statutory remedies. *See, e.g., West Covina v. Perkins*, 525 U.S. 234 (1999)

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[19] *Amicus* Cato argues that "the DAFPA provision at issue in this case is explicitly limited to vehicles and to other personal property worth less than $20,000." (Cato Br. 21.) This argument ignores the fact that the Seventh Circuit held that DAFPA was facially unconstitutional. (Pet. App. 8a.) Thus, the procedures in DAFPA are at issue in this appeal, regardless of the value of the seized property.

(holding that the Constitution does not require local government to provide legal advice about how to use, or the consequences of using, particular remedies). *West Covina* held that with respect to property seized for a police investigation or criminal prosecution, no "rationale justifies requiring individualized notice of state-law remedies which, like those at issue here, are established by published, generally available state statutes and case law." *West Covina*, 525 U.S. at 241.

CONCLUSION

The court of appeals' decision should be reversed.

Respectfully submitted,

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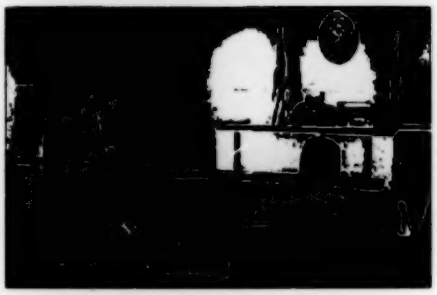
APPENDIX

Information on the Retention Hearing Process

Settlement conference
Before you go to a hearing, an Administrative Law Judge will meet with you and a representative from the Police Department to see if the case can be settled.

If case settles → NO Need for a Retention Hearing

If case is not settled, you go to a hearing



Hearing to keep the car
You can present evidence and call witnesses to challenge the Police Department's case.*

The Police Department must prove that:
- a crime was committed;
- the crime had a relationship to the car;
- the arrest was legal;
- notice was given to the driver or owner; and
- giving the car back will endanger the public.

If judge decides in your favor → Car is returned to owner.

END of Retention Hearing

The Police may still bring a civil case to get the car.

If judge decides in the Police Department's favor

The Police may bring a civil case in N.Y. State Supreme Court to keep the car permanently.

NOTE
The judge makes a decision within three days of the hearing, which is sent to you by mail.

*You have a right to be represented by a lawyer. If you need time to find a lawyer, you may ask the judge to reschedule the hearing. Call 212-442-4900 for free lawyer services information.

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AMICUS CURIAE BRIEF

129

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No. 08-351

In the Supreme Court of the United States

ANITA ALVAREZ, COOK COUNTY STATE'S ATTORNEY,
PETITIONER

v.

CHERMANE SMITH, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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INTEREST OF THE UNITED STATES

This case concerns the constitutional standard for evaluating the process that is due after property is taken into custody as being subject to forfeiture. Because the United States conducts civil and criminal forfeiture proceedings against seized property, it has a direct interest in that constitutional standard. See, *e.g.*, *United States* v. *$8,850 in U.S. Currency*, 461 U.S. 555 (1983); *United States* v. *Von Neumann*, 474 U.S. 242 (1986). The United States has participated as *amicus curiae* in other cases involving due process challenges to forfeiture procedures. See, *e.g.*, *Bennis* v. *Michigan*, 516 U.S. 442 (1996).

STATEMENT

1. This case involves a facial challenge to provisions of Illinois's Drug Asset Forfeiture Procedure Act (Illinois DAFPA), 725 Ill. Comp. Stat. Ann. 150/1 *et seq.* (West 2008). Under Illinois law, illegal drugs, property used to carry out or facilitate drug crimes, and the proceeds of drug crimes are all subject to civil forfeiture. *E.g.*, 720 Ill. Comp. Stat. Ann. 570/505(a) (West Supp. 2009). The Illinois DAFPA sets out procedures for effecting that forfeiture.

Certain categories of personal property—conveyances of any value and other personalty worth $20,000 or less—may be forfeited through a non-judicial, administrative procedure if no one with a property interest demands a judicial proceeding. See 725 Ill. Comp. Stat. Ann. 150/6. Under that non-judicial procedure, within 45 days after the State's Attorney is notified that property has been seized, she provides notice to "all known interest holders of the property." *Id.* 150/6(A). Interest holders then have 45 additional days to demand a judicial forfeiture proceeding, which they can trigger by filing a claim and cost bond with the State's Attorney. If a claim is filed, the State's Attorney must either initiate a judicial forfeiture proceeding within 45 days or return the property. *Id.* 150/6(C), 150/9(A). If no claim is filed, the property is forfeited. *Id.* 150/6(D).

Absent "good cause," a civil judicial forfeiture proceeding is to be heard within 60 days after the claimant answers the complaint. 725 Ill. Comp. Stat. Ann. 150/9(F). The court may stay the civil forfeiture proceeding, however, if a "related" criminal prosecution is pending in a trial court. *Id.* 150/9(J).

2. Respondents brought this action under 42 U.S.C. 1983 against petitioner's predecessor as State's Attor-

ney for Cook County; the City of Chicago; and the Superintendent of the Chicago Police Department. J.A. 30a-31a. The named respondents have had property seized by Chicago police officers and seek to represent a class of similarly situated individuals. Respondents' seized property included currency and automobiles (but their class definition is not limited to specified forms of property). J.A. 34a-35a, 38a.

Respondents did not challenge the initial seizure of their property without an adversary hearing. And respondents acknowledged that petitioner had commenced forfeiture actions against the property of respondents Smith, Perez, Brunston, and Waldo within the time set by the Illinois DAFPA. J.A. 34a-35a. At the time respondents filed their complaint, the period within which to bring a forfeiture action had not yet run with respect to the cash seized from respondents Yunker and Williams. See J.A. 29a, 30a, 35a; 725 Ill. Comp. Stat. Ann. 150/6(C)(2).

Respondents contended instead that due process requires a prompt "probable cause" hearing "within ten business days of any seizure," separate from and prior to the forfeiture proceeding itself. J.A. 36a. Respondents sought declaratory and injunctive relief ordering that such hearings be held. *Ibid.*

The defendants moved to dismiss based on the controlling authority of *Jones* v. *Takaki*, 38 F.3d 321 (7th Cir. 1994). J.A. 53a-55a. In *Jones*, the plaintiffs had brought a putative class action virtually identical to this one. 38 F.3d at 323. Applying this Court's decisions in *United States* v. *$8,850 in U.S. Currency*, 461 U.S. 555 (1983) (*$8,850*), and *United States* v. *Von Neumann*, 474 U.S. 242 (1986), the court of appeals explained in *Jones* that "the Constitution does not require any procedure

prior to the actual forfeiture proceeding," which "is the only hearing to which [claimants] are constitutionally entitled." 38 F.3d at 324. The plaintiffs in *Jones* contended that a forfeiture proceeding was inadequate because it would occur too long after the seizure. The resolution of that claim, the court of appeals held, was controlled by this Court's decision in *$8,850*, which held that claims of unconstitutional delay in the initiation of a forfeiture proceeding are to be analyzed according to a "flexible" and fact-specific analysis of the reasons for a particular delay and any prejudice to the claimant. *Id.* at 323-324 (citation omitted).

In this case, respondents conceded in the district court that *Jones* was controlling. J.A. 75a. The court accordingly dismissed the action. Pet. App. 12a.

3. The court of appeals reversed, overruling *Jones* and holding that due process requires a separate hearing before even a timely forfeiture proceeding.

The court stated that a post-seizure hearing is required before forfeiture and that "[t]he question is the timing of that hearing." Pet. App. 4a. The court concluded that "given the length of time that may result" between seizure and forfeiture, due process requires "some sort of mechanism to test the validity of the retention of the property." *Id.* at 10a. The court noted that the Second Circuit had reached a similar conclusion in a due process challenge to New York City's procedures for maintaining custody of vehicles that may be subject to civil forfeiture. *Id.* at 4a (citing *Krimstock* v. *Kelly*, 306 F.3d 40 (2d Cir. 2002), cert. denied, 539 U.S. 969 (2003)).

While the court in *Jones* had concluded that this Court's decisions in *$8,850* and *Von Neumann* governed the analysis of a claim for speedier post-seizure process,

the court of appeals in this case thought that "there are significant reasons to doubt whether [*$8,850* and *Von Neumann*] should be controlling in the situation [here]." Pet. App. 5a. The court noted that *$8,850* had considered "the speed with which the civil forfeiture proceeding itself is begun," and it deemed that issue to be "a different question from whether there should be some mechanism to promptly test the validity of the seizure." *Id.* at 7a.

The court sided with respondents on the latter question, applying the balancing test articulated in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), and applied to seizures of *real* property in *United States* v. *James Daniel Good Real Property*, 510 U.S. 43 (1993). See Pet. App. 6a-8a. The court thought that "[t]he private interest involved, particularly in the seizure of an automobile, is great," because "[o]ur society is * * * highly dependent on the automobile." *Id.* at 8a. And while "some administrative burden" on the government would result, "due process always imposes some burden on a governing entity." *Id.* at 9a. The court thought that the required process—"notice to the owner of the property and a chance, perhaps rather informal, to show that the property should be released"—would not be onerous. *Ibid.*

The court ordered "appropriate procedural relief," leaving the substance of that relief open on remand. Pet. App. 10a.

SUMMARY OF ARGUMENT

Property may be seized for forfeiture without an advance hearing, so long as a hearing is provided before the property is actually forfeited. *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974). Illinois provides such a hearing. The only question in this case

is whether that hearing is offered too late to satisfy due process.

The resolution of that question appropriately turns on the facts of a particular case. It depends not just on the length of time that the statute permits to elapse between seizure and hearing, but also on why any actual delay occurred and whether the government had a valid justification for the time it used. That fact-specific analysis follows from the holding in *United States* v. *$8,850 in U.S. Currency*, 461 U.S. 555 (1983). If respondents can show that the proceedings to forfeit their money or other property have been delayed beyond valid justification, they can secure the dismissal of the forfeiture proceeding and the return of their property. But respondents have not attempted to make that individualized showing in the state courts.

Rather, respondents contended, and the court of appeals agreed, that the Illinois DAFPA procedure is *facially* inadequate because a judicial proceeding may not commence until 187 days after a seizure, and that Illinois must provide a separate hearing at an earlier stage of the forfeiture process. That holding was erroneous. Illinois has provided a multi-step process for seeking forfeiture, and at each step, it has imposed a short but reasonable time limit that is amply justified by valid administrative and enforcement interests—*e.g.*, in adjudicating all challenges in a single proceeding; in coordinating that proceeding with related criminal matters; and in maintaining interim control over property that is highly susceptible to criminal misuse.

The court of appeals dismissed these weighty interests based on generalized notions of the hardship that some vehicle owners might face during the period before a forfeiture hearing is convened. Those generalizations

do not support the court of appeals' facial holding, which applies to all forfeitures of personal property, from cash to yachts.

Regardless whether the due process question is analyzed under the general rubric of *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), or under the forfeiture-specific analysis of *$8,850*, a statute that provides for a forfeiture hearing within a reasonable time limit is facially constitutional. When, on the facts of a particular case, an individual claimant faces genuine hardship from delay, she may be entitled, under *$8,850*, to additional redress. But respondents have disclaimed any ability to make such an individualized showing in this case. The Illinois forfeiture statute is facially valid, and the Constitution does not require that it be supplemented with the additional preliminary procedure that the court of appeals imposed.

ARGUMENT

A FORFEITURE HEARING PROVIDES ADEQUATE PRE-FORFEITURE PROCESS UNLESS IT IS DELAYED BEYOND THE TIME THAT THE GOVERNMENT'S VALID ADMINISTRATIVE INTERESTS REASONABLY REQUIRE

A. Due Process Requires That Valid Government Interests Support The Timing Of A Forfeiture Hearing

The question presented asks whether the Court should examine the Illinois DAFPA's facial validity using the framework of *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), or instead the analysis in *United States* v. *$8,850 in U.S. Currency*, 461 U.S. 555 (1983). But the choice between the two is in large measure immaterial. As this Court's forfeiture cases show, the outcome of a due process challenge in this context turns not on whether *Eldridge* applies as a formal matter, but on the extent to

which the forfeiture process gives claimants a timely and adequate opportunity to be heard before a forfeiture is decreed.

A claim that a forfeiture proceeding is facially unconstitutional purely because of its timeline requires examination of the government interests that justify the timeline. This Court has considered that question in a number of cases, including *$8,850*. But even if the same question were considered afresh under *Eldridge*, the outcome would be no different.

Eldridge outlined a three-factor test that incorporates consideration of "the private and governmental interests at stake * * * and the nature of the existing procedures." 424 U.S. at 340. For two reasons, however, in this context that test collapses into a single question: Is the timing of the forfeiture hearing adequately supported by valid government interests?

First, in this case no one disputes "the fairness and reliability of the existing [forfeiture] procedures," *Eldridge*, 424 U.S. at 343. Under the Illinois DAFPA, anyone with a known interest in seized goods is entitled to receive notice of the pending forfeiture and to demand a judicial proceeding, with adversary presentations before an impartial factfinder. 725 Ill. Comp. Stat. Ann. 150/6(C)(1) and (2).[1] Respondents assert only that those

[1] Although the State's showing of probable cause to forfeit the property shifts the burden to the claimant to establish by a preponderance that the property is not subject to forfeiture, 725 Ill. Comp. Stat. Ann. 150/9(G), respondents do not contend that this procedure violates due process; indeed, at the additional, preliminary hearings that respondents seek, the State's burden (probable cause) would be precisely the same. J.A. 36a. Moreover, many federal courts have previously upheld an equivalent burden-shifting standard against due process challenges. See, *e.g.*, *United States* v. *$129,727.00 U.S. Currency*, 129 F.3d 486, 491-494 (9th Cir. 1997) (citing cases), cert. denied, 523 U.S. 1065 (1998). In

procedures come too late. J.A. 34a, 36a. If the judicial hearing took place within the ten-day period on which respondents insisted in their complaint, they would apparently have no constitutional objection.

Second, the private interest at issue here concerns only the length of the deprivation, not the nature of the seizure. Respondents recognize that the seizure of their property pending forfeiture did not violate due process. Br. in Opp. 7, 10; see *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974) (*Pearson Yacht*). They contest, and assert an interest in modifying, only the length of time of the forfeiture process.

When a due process challenge concerns only the *timing* of forfeiture proceedings, this Court's cases—both before and after *Eldridge*—have focused principally on the strength of the governmental interests at stake. Although the Court has not expressly applied *Eldridge* to forfeitures of personal property, *Eldridge* is fully consistent with, and would not require any material changes in, the Court's traditional analysis of whether these interests justify the timing of proceedings to forfeit personal property.

B. The Timeliness Of A Forfeiture Action Depends On A Fact-Specific Inquiry That Gives Proper Weight To The Government Interests At Stake

This Court has found the government interests at stake in forfeitures of personal property to be sufficiently weighty as to permit an interim seizure of the for-

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2000, however, Congress decided to impose a higher standard than the Constitution requires; most federal forfeiture statutes now require the government to establish forfeitability by a preponderance of the evidence. 18 U.S.C. 983(c)(1); see 18 U.S.C. 983(i)(2) (exceptions); H.R. Rep. No. 192, 106th Cong., 1st Sess. 11-13 (1999).

feitable property prior to the forfeiture hearing. That holding is consistent with the Court's recognition in other contexts, both before and after *Eldridge*, that important government interests can justify using postdeprivation procedures to satisfy due process. *E.g.*, *Gilbert* v. *Homar*, 520 U.S. 924, 930-931 (1997) (citing cases). To be sure, the Court has applied *Eldridge* to reach a different conclusion with respect to real property, in which the private rights are stronger and the government interests may be protected by other means. But where personal property is at issue, the Court has consistently concluded that the Due Process Clause permits the government to take a reasonable amount of time, in the service of its valid interests, before holding the forfeiture hearing.

1. In *Pearson Yacht*, the Court gave three crucial reasons why a forfeiture hearing may be held after the initial seizure of personal property. First, "the property seized * * * will often be of a sort that could be removed to another jurisdiction, destroyed, or concealed." 416 U.S. at 679. Accordingly, requiring "advance warning of confiscation" might well "frustrate the interests" that forfeiture statutes are intended to serve, such as "preventing continued illicit use" of the instrumentalities of crime and "enforcing criminal sanctions." *Ibid.* Second, the furtherance of those important public purposes is entrusted to public officials, whereas the Court had previously struck down replevin statutes giving "self-interested private parties" the authority to seize private property without a hearing. *Ibid.* (citing *Fuentes* v. *Shevin*, 407 U.S. 67 (1972)). Finally, the seizure asserts a court's *in rem* jurisdiction over the property and permits a single proceeding to adjudicate any competing interests in the property. *Ibid.*

2. Where real property is involved, by contrast, different considerations apply, and the Court accordingly has held that the government must establish *before* an initial seizure that the property is subject to forfeiture. In *United States* v. *James Daniel Good Real Property*, 510 U.S. 43 (1993) (*Good Real Property*), the Court acknowledged the holding of *Pearson Yacht* that the government's interest in forfeiture proceedings was sufficient to dispense with any requirement of pre-seizure notice or hearing. But the Court concluded that "when the target of forfeiture is real property," the "essential considerations" underlying *Pearson Yacht* were no longer operative. *Id.* at 57. "[R]eal property cannot abscond," *ibid.*, so the government's legitimate interests in preserving the property and preventing it from being used for further illegal activity can be served without actually seizing the property, *id.* at 58; similarly, the court will maintain jurisdiction over the *in rem* proceeding without the necessity of a seizure, *id.* at 57. The Court also noted that home ownership has "historic and continuing importance" and that seizing a home causes "far greater deprivation" than seizing personal property. *Id.* at 53-54.

The Second Circuit has read *Good Real Property* as supporting the proposition that "enforcement of the drug forfeiture laws did not present 'a plausible claim of urgency' strong enough to dispense with normal due process guarantees" even in the context of personal property. *Krimstock* v. *Kelly*, 306 F.3d 40, 66 (2002), cert. denied, 539 U.S. 969 (2003). The court below agreed. But that reading is incorrect.

As in *Pearson Yacht*, the Court recognized in *Good Real Property* that there *is*, in fact, a valid and "special need for very prompt action" when the owner of prop-

erty subject to forfeiture can easily "frustrate the government's interests in the forfeitable property" before a hearing can be brought. 510 U.S. at 52 (quoting *Pearson Yacht*, 416 U.S. at 678). Considering "whether the same considerations apply *to the forfeiture of real property*," *ibid.* (emphasis added), the Court explained in detail why real property requires a different rule: because of practical considerations, *id.* at 52-53, 57 (real property "can be neither moved nor concealed"), principles of *in rem* jurisdiction, *id.* at 57-58 (real property may be brought within the court's jurisdiction without being seized), and available alternatives to seizure, *id.* at 58-59 (a notice of *lis pendens* may be effective to prevent an owner from disposing of real property).

Good Real Property, therefore, established that the heightened interests of *real property* owners justify requiring a pre-seizure hearing. The Court in that case did not dispute that significant governmental interests underlie proceedings to forfeit the instrumentalities of crime. And the Court did not address whether, when those interests *do* justify a seizure without a hearing, they also support taking more than ten days before a hearing is convened.

3. This Court considered that timing question in *$8,850*, in which it set out a framework for analyzing whether valid government interests justify the length of time between a valid seizure and the hearing. As the Court explained, the Due Process Clause requires "a hearing 'at a meaningful time'" before property may be permanently forfeited. 461 U.S. at 562 (quoting *Fuentes*, 407 U.S. at 80). And the Court confirmed that "a postseizure delay may become so prolonged that the dispossessed property owner has been deprived of a meaningful hearing at a meaningful time." *Id.* at 562-563.

But identifying such unconstitutional delay requires a "flexible approach" that "depends * * * heavily on the context of the particular situation." *Id.* at 564, 565 n.14.

The defendant currency in *$8,850* was identified as subject to forfeiture and seized by the former United States Customs Service when the owner, Mary Vasquez, arriving from Canada, falsely understated the amount of currency she was bringing into the country, in violation of a reporting statute. Shortly after the seizure, Vasquez filed a petition for remission or mitigation of the forfeiture.[2] For approximately seven months thereafter, Customs investigated whether the seized currency was connected to drug trafficking, which would compound the offense; Customs concluded that it was not. Vasquez was then indicted for the reporting offense and for making a false statement to Customs; the indictment also sought criminal forfeiture of the currency. Criminal proceedings in the case lasted six months. Vasquez was acquitted of the reporting violation on which the criminal forfeiture allegation was based. Customs then referred the case to the United States Attorney to pursue civil forfeiture, denying the remission petition at about the same time. A civil forfeiture action was ultimately filed 18 months after the original seizure. See 461 U.S. at 558-560 & n.7.

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[2] Petitions for remission or mitigation are common in civil forfeiture enforcement, see *$8,850*, 461 U.S. at 558. The relevant statute vests discretionary authority in the appropriate official to remit (*i.e.*, forgive) or mitigate (*i.e.*, reduce) a forfeiture upon finding that the forfeiture was "incurred without willful negligence or without any intention" by the owner to violate the law, or that other mitigating circumstances exist. 19 U.S.C. 1618. That provision is incorporated by reference in nearly all federal civil forfeiture statutes. See, *e.g.*, 18 U.S.C. 981(d); 21 U.S.C. 881(d).

Vasquez conceded that the seizure was constitutional, see 461 U.S. at 562 & n.12, but asserted that the "dilatory" commencement of the forfeiture action and the "dilatory processing" of the remission petition violated due process and warranted dismissal of the forfeiture proceeding. The Ninth Circuit agreed, *id.* at 560-561, but this Court reversed.

This Court acknowledged that "a claimant whose property has been seized * * * has been entirely deprived of the use of the property." 461 U.S. at 564. But the Court also recognized the "value of allowing the Government time to pursue its investigation." *Ibid.* To balance these competing considerations, the Court adopted a framework "analog[ous]" to the one used in *Barker* v. *Wingo*, 407 U.S. 514 (1972), to determine when a defendant's right to speedy trial is violated.[3] (The Court acknowledged that a criminal defendant's loss of liberty while awaiting trial "may well be more grievous" than the deprivation of particular items of personal property, and accordingly that "the balance of the interests * * * may differ" in the forfeiture context. *$8,850*, 461 U.S. at 565 n.14.) The *Barker* analysis uses four fact-laden considerations as "guides in balancing the interests of the claimant and the Government," *id.* at 564-565:

a. *Length of the delay:* The Court stated that no bright constitutional line can be drawn as to the length of the delay, and that the point at which a delay becomes unconstitutional "necessarily depends on the facts of the particular case." 461 U.S. at 565; see *id.* at 564. The 18-month delay in *$8,850* itself was "quite significant,"

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[3] The Court did not discuss *Eldridge*, though Vasquez had cited it. Br. for Resp. (Claimant) at 26, *$8,850*, *supra* (No. 81-1062).

though the Court ultimately found it reasonable. *Id.* at 565.

b. *Reasons for the delay:* The Court confirmed that the government has valid reasons for not making an immediate forfeiture determination, and cited three in particular: the need to investigate the circumstances, to handle remission petitions, and to coordinate with criminal proceedings. First, a seizure decision at the border is "of necessity a hasty one," and the government must be permitted "some time to investigate the situation" beyond that initial assessment to decide whether to pursue forfeiture or return the asset. 461 U.S. at 565. Second, if the government seeks to postpone formal forfeiture proceedings while investigating a pending remission petition, that is a "weighty factor" in the government's favor, because the vast majority of remission petitions result in at least partial relief, and remission thus can spare both parties the burdens of formal litigation. *Id.* at 558, 566-567.[4] Third, the parties often have good reason to postpone civil proceedings while related criminal proceedings are pending—for instance, to avoid issue preclusion, to prevent the other party from exploiting broad civil discovery to gain an advantage otherwise unavailable in the criminal prosecution, or to preserve the defendant's ability to raise inconsistent arguments in the two proceedings. *Id.* at 567. Thus, the need to await a verdict in the criminal trial may slow down the civil proceeding through no fault of the parties. See *id.* at 568.

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[4] Some federal agencies follow this course and seek to consider remission petitions before a claimant triggers a judicial forfeiture proceeding. See *$8,850*, 461 U.S. at 566 nn.15-16. Agencies within the Department of Justice consider remission petitions after forfeiture is decreed.

c. *The defendant's assertion of the right:* When a defendant has the ability to trigger an early judicial forfeiture proceeding, but does not do so, she provides "some indication" of acquiescence in the timing of the civil proceeding. 461 U.S. at 569. For example, under the federal framework, Vasquez had multiple ways of compelling the forfeiture process to move forward: (1) filing an equitable action seeking an order compelling commencement of a civil judicial action or return of the seized property; (2) informally requesting the seizing agency to refer the matter to the United States Attorney; and (3) filing a motion under then-Rule 41(e) of the Federal Rules of Criminal Procedure—now Rule 41(g)—challenging the validity of the seizure and seeking return of the property. Vasquez did not avail herself of any of these options, which rebutted her subsequent claim of unconstitutional delay. *Ibid.*

d. *Prejudice to the defendant:* An actual impact on the defendant's ability to mount her defense, such as "the loss of witnesses" due to the government's delay in filing, "could be a weighty factor indicating that the delay was unreasonable." 461 U.S. at 569. Vasquez had shown no prejudice and, indeed, had conceded that her cash met the requirements for forfeiture. *Ibid.*

4. The Court confirmed in *United States* v. *Von Neumann*, 474 U.S. 242 (1986), that "the forfeiture proceeding, without more, provides the postseizure hearing required by due process to protect [a] property interest" in forfeitable property. *Id.* at 249. The Court rejected the notion that due process requires a separate, speedier proceeding.

John Von Neumann attempted, unsuccessfully, to bring a car across the U.S. border without declaring it. Customs seized the car for forfeiture. Von Neumann

filed a petition for remission or mitigation, which Customs partially granted 36 days later by reducing the forfeiture to a $3600 penalty. (In the interim, Von Neumann had gotten his car back by posting a bond for its value.) Von Neumann then challenged the mitigated penalty on the ground that the government had taken an unconstitutionally long time to rule on his remission petition. The Ninth Circuit initially held that Customs must resolve such petitions within 24 hours. See 474 U.S. at 245-247. After *$8,850*, it discarded that per se rule but concluded that the *$8,850* balancing test for timeliness must be applied not only to the forfeiture proceeding, but also to the handling of the remission petition. The court opined that "the special hardships imposed on persons deprived of the use of their automobiles" meant that even "'[a] five-day delay in justifying detention of a private vehicle is too long.'" *Von Neumann* v. *United States*, 729 F.2d 657, 661 (9th Cir. 1984) (citation omitted).

This Court reversed. It rejected Von Neumann's argument that remission was an essential first step in the process by which the government forfeits property and that it accordingly is subject to the same analysis under the Due Process Clause as the underlying forfeiture proceeding. See 474 U.S. at 249. Rather, the Court explained, the remission procedure simply grants the government the discretion not to pursue a complete forfeiture even when it is entitled to one; it is not *necessary* to a forfeiture determination, and the Constitution does not entitle claimants to "a speedy disposition * * * without awaiting a forfeiture proceeding." *Ibid.*; see *id.* at 250. The Constitution mandates a timely forfeiture proceeding before property may be permanently forfeited, but no more. See *id.* at 249 ("Implicit in this

Court's discussion of timeliness in *$8,850* was the view that the forfeiture proceeding, without more, provides the postseizure hearing required by due process to protect Von Neumann's property interest in the car."). In particular, the Constitution does not require a preliminary, near-immediate proceeding before the commencement of a timely forfeiture hearing.

C. The Court Of Appeals' Facial Holding Overlooked Valid Government Interests In Forfeiture Proceedings That Were Dispositive In *$8,850*

The court of appeals in this case incorrectly concluded that *$8,850* can be "properly * * * distinguished" and that respondents' entitlement to speedier process can be ascertained as a facial matter—potentially on a class-wide scale. Pet. App. 7a. The court thought that "the speed with which the civil forfeiture proceeding itself is begun" was "a different question from whether there should be some mechanism to promptly test the validity of the seizure." *Ibid.* But the court erred by not crediting the forfeiture proceeding itself with being such a mechanism. See *Von Neumann*, 474 U.S. at 249. The forfeiture hearing plainly permits claimants to "test the validity of the seizure," as respondents concede and the court of appeals did not dispute. The only question is whether the forfeiture hearing does so sufficiently "promptly," and that question is properly answered in each case by the analysis in *$8,850*.

The court of appeals therefore did not fully analyze the question when it hypothesized that "it could be a maximum of 187 days" from seizure until a forfeiture proceeding is filed, and concluded that that period is necessarily too long. Pet. App. 3a; see *id.* at 8a. Half a year indeed may be too long in some cases, but the hold-

ing of *$8,850* is that the length of time before proceedings begin cannot by itself establish a due process violation. See 461 U.S. at 565-568. Indeed, the Court in *$8,850* held constitutionally adequate a procedure that did not commence until *18 months* after seizure—three times as long as the hypothetical maximum here—because there were valid reasons for the timing.

The court of appeals should have considered whether the particular time limits that apply to each step of the forfeiture procedure are justified on their face by valid government interests. The mere fact that forfeiture proceedings *may* not be initiated for approximately six months is not a basis for the facial invalidation of the statute without any analysis of how the statute has been applied and whether the time taken serves valid interests. Cf. *FDIC* v. *Mallen*, 486 U.S. 230, 242 (1988) (the mere "danger of an interminable delay by the agency" is insufficient to show that post-deprivation process is facially inadequate).

In examining whether a time period is facially justifiable, this Court has the benefit not only of its own previous examinations in *$8,850* and *Von Neumann*, but also of the extensive time and study that Congress has devoted to the question. Between 1992 and 2000, Congress held a lengthy series of hearings on forfeiture reforms, culminating in the Civil Asset Forfeiture Reform Act of 2000 (CAFRA), Pub. L. No. 106-185, 114 Stat. 202. CAFRA set out enforceable time limits for several steps in most federal forfeiture proceedings,[5] reflecting Con-

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[5] The deadlines in 18 U.S.C. 983(a) apply to forfeitures that begin as administrative proceedings, with exceptions noted in 18 U.S.C. 983(i)(2). Some classes of property are ineligible for administrative, non-judicial forfeiture and can only be forfeited through judicial proceedings. See 18 U.S.C. 985(a) (real property ineligible); 19 U.S.C. 1607(a)(1)-(4) (list-

gress's careful examination of how much time law enforcement officials realistically need to publish notice, process claims, and decide whether to pursue forfeiture. Significantly, each time limit is notably longer than the truncated period that respondents favor, and many permit extensions for good cause. As petitioner notes (Br. 65-66), CAFRA's deadlines are comparable in many respects to the Illinois DAFPA's time periods.

1. The government has valid interests in identifying and contacting potential claimants before initiating a judicial proceeding

The first step in the forfeiture procedure allows the State's Attorney to review the facts gathered by the law enforcement agency that seized the property and to notify all interest holders that the property is subject to forfeiture. The court of appeals' remedy disregarded the several valid reasons for that step.

First, any proceeding to protect claimants' due process rights must first seek to identify those claimants. The court of appeals appeared to contemplate that the persons entitled to demand a hearing will be readily identifiable at the time of seizure. That is not so in all or even most cases. Each piece of property may have many potential claimants, each with a right to contest forfei-

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ing categories of personal property eligible for administrative forfeiture); see also, *e.g.*, 18 U.S.C. 981(d) (incorporating 19 U.S.C. 1607). And the government sometimes initiates judicial forfeiture even when it could first seek administrative forfeiture. Although CAFRA's deadlines do not apply in that circumstance, Department of Justice policy encourages initiation of civil judicial forfeiture actions within 150 days of seizure or, if the property is ineligible for administrative forfeiture, within 90 days of receipt of a claimant's written request for release of the property.

ture.[6] The person from whom the property is seized may not even be one of them.[7] Ascertaining their identities takes time and care, particularly when the property is personalty. Ownership and other interests in various kinds of personal property are not publicly recorded. A prime example is cash: ownership is not apparent from the face of a bill, and the money may belong to someone other than the person found with it. See, *e.g.*, *United States* v. *Alcaraz-Garcia*, 79 F.3d 769, 776 (9th Cir. 1996) (claimants gave money to defendant to deliver to others; claimants were bailors under state law and could contest forfeiture). And even where alternatives to personal notice are permissible, they take time. See 725 Ill. Comp. Stat. Ann. 150/4(A)(3) (publication notice requires three weeks); cf. Supp. R. for Admiralty or Mar. Cl. & Asset Forfeiture Actions G(4)(a)(iii) (publication notice of a civil forfeiture action requires between three weeks and 30 days).

For these reasons, Congress decided that under the framework that applies to most federal forfeitures, see note 5, *supra*, the government must notify an interested party within 60 days after seizure *or* after learning of the party's interest (with a slightly longer period when the initial seizure was made by state or local authorities). By that date, the federal law enforcement agency must either: (1) commence the administrative forfeiture process by sending notice to potential claimants; (2) ini-

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[6] *E.g.*, 18 U.S.C. 983(d)(1) and (6)(A) (cognizable "ownership interest[s]" for the innocent-owner defense include "a leasehold, lien, mortgage, recorded security interest, or valid assignment").

[7] See, *e.g.*, *United States* v. *$515,060.42 in U.S. Currency*, 152 F.3d 491, 498 (6th Cir. 1998) (explaining that a possessor must offer "factual allegations" regarding her "relationship to" or "control of the property" to establish a cognizable interest).

tiate a civil or criminal forfeiture proceeding by filing a complaint or obtaining an indictment; or (3) return the property. 18 U.S.C. 983(a)(1)(A) and (F). This deadline may be extended only under limited circumstances, first by a supervisory official at agency headquarters (once only) and thereafter by the courts. 18 U.S.C. 983(a)(1)(B)-(D).[8] The Illinois DAFPA has a comparable framework, with a longer initial period but fewer provisions for tolling or extending the period.[9]

Second, identifying and notifying potential claimants before conducting a forfeiture hearing also serves the government's interest in efficiency. When many claimants all seek to contest the same forfeiture, requiring the government to litigate seriatim hearings would not only be administratively burdensome, but also would give subsequent claimants the benefit of a preview of the government's case. Thus, forfeiture cases customarily resolve all claims in a single *in rem* proceeding. See, *e.g.*, *Good Real Property*, 510 U.S. at 57-58. The court of appeals appeared to contemplate that each claimant would be entitled to a separate preliminary hearing; any such holding would unjustifiably disrupt Illinois's valid efforts to resolve ownership in a single proceeding accessible to all potential claimants.

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[8] Petitioner's statement (Br. 66) that the deadline may be extended "[i]f the federal government did not have adequate evidence at the time the complaint was filed" is incorrect. See 18 U.S.C. 983(a)(1)(B) and (D).

[9] Petitioner suggests (Br. 64 n.6) that some portion of that initial period may be used to discuss with potential claimants whether to return the property, akin to the time for consideration of remission petitions under many federal forfeiture statutes. There is an additional, equally valid governmental interest in postponing proceedings during efforts at informal resolution. *$8,850*, 461 U.S. at 566.

Third, the notice procedure allows the government to separate uncontested forfeitures (which, by definition, do not violate due process) from contested forfeitures. That consideration is highly important, because only a small minority of forfeitures are actually contested, even after the government identifies and notifies potentially interested parties. See Stefan D. Cassella, *Asset Forfeiture Law in the United States* § 4-1, at 132 n.2 (2007). In those cases, the forfeiture is resolved without "unnecessary and burdensome court proceedings." *$8,850*, 461 U.S. at 566.

Accordingly, if the court of appeals' remedy were taken to require a probable-cause hearing shortly after *every* seizure of personal property, it would far exceed the requirements of the Due Process Clause and burden the judicial system with hearings even in uncontested cases. Cf. *$8,850*, 461 U.S. at 564, 568-569 (in evaluating the timeliness of a forfeiture hearing, weighing the claimant's invocation of her rights to prompt process). The court of appeals left the scope of its holding unclear, leaving it to the district court to consider "what a claimant must do to activate" the newly required procedure. Pet. App. 10a. But, of course, Illinois already provides a hearing on demand, and its procedure—unlike that contemplated by the court of appeals—gives appropriate weight to the State's interest in resolving all competing interests in a single proceeding, including interests that are not ascertainable at the time of seizure. See pp. 20-22, *supra*. As in the federal system, Illinois allows claimants a specified period within which to file a claim. The filing of one or more claims requires the State's Attorney to begin forfeiture proceedings within 45 days. 725 Ill. Comp. Stat. Ann. 150/6(C)(1) and (2). By comparison, in the federal system, the U.S. Attorney must

commence a civil or criminal forfeiture action within 90 days of receiving a claim. If he does not, and if the time is not extended by a court "for good cause shown," the government must return the property and is forever barred from reinitiating civil forfeiture proceedings against that property based on the same underlying offense. 18 U.S.C. 983(a)(3)(A) and (B).

2. The government has valid interests in coordinating forfeiture proceedings with related matters

The timing of forfeiture proceedings is often affected by the valid interest in coordinating with the prosecution of a crime that makes property forfeitable. Respondent Yunker, for instance, was indicted after his cash was seized. J.A. 35a. As this Court recognized in *$8,850*, coordination with criminal proceedings is "an element to be considered in determining whether delay is unreasonable." 461 U.S. at 567. An adversary hearing on the forfeitability of cash may require the State to present precisely the same evidence that will inculpate the claimant in a criminal proceeding, or it may jeopardize an ongoing criminal investigation that the government is not yet prepared to announce publicly. See 18 U.S.C. 981(g)(1) (providing for a stay of civil proceedings to protect related criminal investigations that have not yet resulted in formal charges); S. Rep. No. 225, 98th Cong., 1st Sess. 215-216 (1983) (explaining the need for an earlier provision that permitted a stay while a related criminal proceeding was pending); 1 David B. Smith, *Prosecution and Defense of Forfeiture Cases* § 10.02[2], at 10-17 (June 2005) (Smith) (Section 981(g)(1) "recognizes that the need for confidentiality is at least as great during the investigatory stage of a criminal case.").

Conversely, as Congress has recognized, a claimant will often prefer that the forfeiture action be stayed while a related criminal proceeding is ongoing, because litigating both proceedings simultaneously might put the claimant in a difficult position. See 18 U.S.C. 981(g)(2); see also, *e.g.*, *United States* v. *4003-4005 5th Ave.*, 55 F.3d 78, 83 (2d Cir. 1995) (claimant in civil forfeiture case faces the dilemma of remaining silent and allowing the forfeiture or testifying against the forfeiture and exposing himself to incriminating admissions); cf. *Vermont* v. *Brillon*, 129 S. Ct. 1283, 1290 (2009) (in the speedy-trial context, "delay caused by the defense weighs against the defendant"). A preliminary hearing that involves the claimant's assertion of an innocent-owner defense (see Pet. App. 9a, 10a) would create tension with the claimant's right against compelled self-incrimination in any related criminal case because the government would be entitled to test that defense through discovery and cross-examination. See, *e.g.*, 1 Smith § 10.01, at 10-3 to 10-4 (Dec. 2007).[10]

Even absent that consideration, the necessary discovery and witness preparation would consume time that either side may decide is more productively spent preparing for the criminal proceeding. Respondents have demanded that the probable-cause hearing be held within ten days, but far from solving the problem, that

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[10] The court of appeals left open the scope of the preliminary hearing it would require. The hearing required by *Krimstock* examines considerably more than just a prima facie showing of probable cause. See *Krimstock* v. *Kelly*, 506 F. Supp. 2d 249, 252 (S.D.N.Y. 2007) (city must show probable cause for arrest, likelihood that forfeiture will be decreed, and "necess[ity] that the vehicle remain impounded in order to ensure its availability in the eventual civil forfeiture action").

would only make it more difficult for each side to marshal its own evidence and test the other side's.

3. The government has valid interests in maintaining interim custody of personal property

In addition to having a facially valid interest in devoting adequate time to the orderly investigation, processing, and (if necessary) litigation of forfeitures, the government generally has strong reasons to maintain custody of forfeitable personal property during that time.

Personal property, unlike real property, can easily be moved, transferred, concealed, or destroyed. As the Court recognized in *Good Real Property*, the government has "legitimate interests * * * [in] ensur[ing] that the property not be sold, destroyed, or used for further illegal activity prior to the forfeiture judgment." 510 U.S. at 58.[11] And whereas real property will stay put if released from custody pending the forfeiture proceeding, that is not true of cash, conveyances, or other personal property subject to the Illinois DAFPA.

Because of the essential differences between real property and personal property, the legal mechanisms other than custody that can protect the government's interest in the former will not adequately secure the latter pending a forfeiture determination. Real property changes ownership by recorded transaction, and purchasers of real property are on inquiry notice of any claims recorded against the title. Thus, a notice of *lis pendens* will prevent any bona fide sale of real property

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[11] Indeed, some contraband subject to forfeiture may pose a direct threat to public health and safety if left in public circulation pending the judicial proceeding. See, *e.g.*, *Ewing* v. *Mytinger & Casselberry, Inc.*, 339 U.S. 594, 599-600 (1950) (misbranded pharmaceuticals).

that could frustrate the government's interest in forfeiture. See *Good Real Property*, 510 U.S. at 58. No such tool exists to prevent the transfer of cash or cars; even a perfected security interest recorded against a vehicle title will not prevent the car from being concealed or transferred unlawfully. Similarly, a restraining order of the kind the Court suggested in *Good Real Property* (see *ibid.*) may not fully protect the government's interests once the instrumentalities or proceeds of crime are released from custody pending forfeiture. In the case of currency, no such relief appears possible; the cash either is in custody or may be spent freely, with no middle ground.[12]

4. The court of appeals' focus on vehicles does not overcome the valid government interests at stake

The court below sought to justify its demand for a preliminary hearing by citing the centrality of automobiles to modern society. The importance of automobiles is well established, but irrelevant here, for two reasons.

First, this case is a facial challenge, brought by a putative class, to the Illinois forfeiture procedure that applies to all conveyances and to other non-real property worth less than $20,000. Not all putative class members even have automobiles at issue. See J.A. 38a. Three named respondents are contesting only the seizure of cash; as this Court's due process cases recognize, the temporary deprivation of money may be a less severe hardship than the seizure of an automobile. *City of Los Angeles* v. *David*, 538 U.S. 715, 717-718 (2003) (per curiam). And drug forfeiture statutes are commonly used against forms of personal property that are neither

[12] Restraining orders also may not adequately guarantee that an owner facing forfeiture will actively preserve the value of the property.

cash nor cars, including other conveyances. See, *e.g.*, *Pearson Yacht*, 416 U.S. at 669; *United States* v. *One 1974 Learjet 24D*, 191 F.3d 668, 670-671 (6th Cir. 1999); *United States* v. *Indoor Cultivation Equip.*, 55 F.3d 1311, 1312 (7th Cir. 1995). A reason that would apply, at most, to only one sub-category of claimants cannot support invalidation of the entire statute at the pleading stage. But that is what the court of appeals did; indeed, it devoted only a single sentence to analyzing forfeiture of property *other* than automobiles. See Pet. App. 8a-9a ("The person from whom cash is seized also has a strong interest in a hearing, although obviously the posting of a cash bond for cash is an absurdity.").[13]

Second, this Court already has rebuffed the suggestion that automobiles deserve special protection in the forfeiture context. In *Von Neumann*, the claimant "urge[d] the importance of automobiles to citizens in this society" in contending that the 14-day deprivation of his car before he posted bond amounted to a due process violation. 474 U.S. at 250-251. The Ninth Circuit agreed, observing that "special hardships [are] imposed on persons deprived of the use of their automobiles" and suggesting that the detention of Von Neumann's car had violated due process. *Von Neumann*, 729 F.2d at 661. This Court held, however, that the "right to a forfeiture proceeding meeting the *Barker* test satisfies any due process right with respect to [both] the car and the money [that Von Neumann posted as bond to redeem the car]." 474 U.S. at 250-251. In so holding, the Court drew no distinction at all between automobiles and money.

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[13] The plaintiffs in *Krimstock* sought relief specific to vehicles. 306 F.3d at 47.

Nor would a categorical rule affording greater protection to automobiles make sense. As important as automobiles may be, they are also—and for precisely the same reasons—among the most essential instrumentalities of crime. Many forfeiture laws, including the one here, target contraband that is moved surreptitiously around (or into) the country. Motor vehicles are crucial to those operations. Forfeiture serves the "significant government purpose[]," *Pearson Yacht*, 416 U.S. at 679, of preventing the vehicles from continuing to facilitate crime. See 19 U.S.C. 1595a(a) (specifically identifying conveyances that facilitate smuggling as subject to forfeiture); see also, *e.g.*, 8 U.S.C. 1324(b)(1) (same, for vehicles used in alien smuggling); 21 U.S.C. 881(a)(4) (same, for conveyances that facilitate drug transactions). Thus, even if it were appropriate to look categorically at claimants' interest in regaining use of their automobiles, the court of appeals erred by not recognizing the government's converse and equally strong interest in keeping seized automobiles from being returned to criminal use.

5. Courts hearing forfeiture proceedings can consider whether government interests validly justify delay

Respondents suggest (Br. in Opp. 13) that the *$8,850* analysis is relevant only to whether to dismiss a forfeiture proceeding, and that it has no bearing on whether due process requires a *different* proceeding at a preliminary stage. That contention lacks merit. As the Court explained in both *$8,850* and *Von Neumann*, the timing considerations that the Court set forth determine whether the forfeiture hearing is a constitutionally adequate, suitably prompt form of process.

To be sure, an unconstitutional delay under *$8,850* may result in dismissal of a forfeiture proceeding and

return of property, where the claimant has shown that she has not received (and will not receive) timely process. The possibility that further delay may violate due process can influence a court's decision to set deadlines or grant continuances, see, *e.g.*, 18 U.S.C. 983(a)(1)(C) and (3)(A); cf. *Brillon*, 129 S. Ct. at 1292, and will certainly encourage the government to act diligently, cf. *Zedner* v. *United States*, 547 U.S. 489, 499 (2006). When notwithstanding this inventive, the government takes unreasonable time in proceeding to a forfeiture hearing, a dismissal and return of the seized property are appropriate.

That remedial approach properly considers in each case whether the government has taken an unreasonably long time to proceed to a forfeiture hearing. By contrast, respondents' argument would impose a new layer of procedure in *all* cases, regardless whether the forfeiture proceeding would have commenced in a timely way. The addition of this novel hearing, even when the government is acting expeditiously and in accordance with all previously recognized due process requirements, would undermine the government's significant interests in conducting sound and effective forfeiture proceedings.

D. Interim Remedies Mitigate Genuine Hardship Without Imposing A New Layer Of Forfeiture Procedure

The Court in *$8,850* listed several interim measures available to claimants seeking to avoid delay under the pre-CAFRA federal framework. Most significantly, if a civil forfeiture action has not yet been filed, a claimant can bring an equitable action to compel the government to initiate the civil proceeding, or he can seek return of the seized property under what is now Rule 41(g) of the

Federal Rules of Criminal Procedure. 461 U.S. at 569. The Court also noted that the federal government has voluntarily adopted nonjudicial discretionary procedures to afford relief, such as remission and mitigation petitions. See *id.* at 558, 566-567; accord *Von Neumann*, 474 U.S. at 246, 249-250.[14]

Petitioner and respondents dispute whether those options exist under the Illinois framework. Compare Br. in Opp. 19-20, Pet. App. 7a, and J.A. 32a, with Pet. Br. 60-65. The current record does not clearly establish whether they do. In the federal system, these remedies allow some forfeiture decisions and proceedings to be placed on a fast track, without also requiring the government to preview its case in an adversarial proceeding shortly after seizure. Thus, if such remedies are available in Illinois, they further ameliorate any hardship that claimants may suffer, and they make even less likely the court of appeals' hypothesis that many cases will involve unjustified, prejudicial delay.

In CAFRA, Congress also crafted an interim remedy that addresses genuine hardship while respecting the government interests discussed above. CAFRA added a new federal provision that, in carefully delimited circumstances (unlike the court of appeals' blanket remedy), permits an owner who suffers genuine hardship from the interim deprivation of her property to secure its release. 18 U.S.C. 983(f). The hardship must be gen-

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[14] Respondents assert that federal law permits release of property upon posting a 10% bond. Br. in Opp. 20. That is inaccurate. A 10% "cost bond" covers the cost of a civil judicial forfeiture action and does not secure release of the property. CAFRA largely eliminated those cost bonds. See 18 U.S.C. 983(a)(2)(E) and (i). Under 19 U.S.C. 1614, a claimant may seek discretionary release of seized property upon offering a bond for the *full value* of the property.

uine and individualized, not merely based on generalizations about the importance of a particular type of asset. See 18 U.S.C. 983(f)(1)(C). The government can obtain security against the property's disappearance or loss of value. See 18 U.S.C. 983(f)(1)(B) and (7) (claimant must show by her ties to the community that the property will be available at trial, and court may order measures to preserve the property's value). And some property is generally ineligible, such as currency. 18 U.S.C. 983(f)(8). CAFRA's hardship provision illustrates that a remedy may appropriately balance claimants' interests and the government's without requiring any change to the timing of the forfeiture proceeding or an early rehearsal of the government's case.

The hardship provision and other measures for interim relief illustrate the care with which Congress and many state legislatures have crafted protections for forfeiture claimants over and above what the Constitution requires. Compare, *e.g.*, 18 U.S.C. 983(d) (innocent-owner defense), and 725 Ill. Comp. Stat. Ann. 150/8 (same), with *Bennis* v. *Michigan*, 516 U.S. 442 (1996) (the Due Process Clause does not require an innocent-owner defense). Those protections strike a workable balance between the public interest in forfeiture enforcement and the individual interests of property owners. The federal and state legislatures, not the federal courts, are best suited to determine whether to modify that balance by adding another hearing requirement.

* * * * *

By providing for a single, unified forfeiture proceeding with enforceable time limits, Illinois has committed itself to expeditious resolution of contested forfeiture matters while providing sufficient time to accommodate significant administrative interests. That time-limited

procedure is a facially valid means of resolving challenges when a forfeiture of cash, vehicles, or other personal property is contested.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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MAY 2009

AMICUS CURIAE BRIEF

No. 08-351

IN THE

Supreme Court of the United States

ANITA ALVAREZ, Cook County State's Attorney,

Petitioner,

—v.—

CHERMANE SMITH, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF ILLINOIS IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI*[1]

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The ACLU of Illinois is one of its statewide affiliates. *Amici* respectfully submit this brief to assist the Court in resolving an issue of longstanding concern to the ACLU—namely, the scope of due process rights in civil forfeiture proceedings.

STATEMENT OF THE CASE

This case was filed by several individuals whose property was seized by the state under the Illinois Drug Asset Forfeiture Procedure Act ("DAFPA"), 725 ILCS 150/1 *et seq.* Respondents do not challenge the State's authority to forfeit assets connected to a drug crime. Nor do they claim a right to a hearing prior to the seizure of their personal property. Under Illinois law, however, the forfeiture hearing provided by DAFPA need not occur until six months after the seizure of the property and often

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[1] The parties have filed blanket letters of consent to all *amicus* briefs with the Clerk of the Court. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members or their counsel made a monetary contribution to this brief's preparation or submission.

does not occur for a year or more.[2] The only issue presented by this case is whether, given those delays, due process requires a preliminary hearing to determine whether the State should retain the seized property pending a final forfeiture decision.

Such lengthy delays represent a hardship for most property owners but, as the Seventh Circuit recognized below, the hardship is particularly severe for individuals whose automobiles are seized. Moreover, those delays are inescapable even for innocent owners—like Respondents Smith, Perez and Brunston—whose cars were allegedly used for drug-related offenses without their knowledge and consent. Although Illinois law entitles innocent owners to the return of their cars, 725 ILCS 150/8(A)(i), the return of their cars must await a final forfeiture hearing under DAFPA. In the meantime, Respondents and others like them are deprived of their principal means of transportation to work, school and other significant life obligations (such as medical appointments).

When Respondents began this action, they had already been waiting up to ten months for forfeiture proceedings and, they hoped, the return of their seized property. Despite this long delay, their due process complaint was dismissed by the district court

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[2] In theory, DAFPA provides for initiation of a forfeiture hearing for property worth less than $20,000 within 187 days. *See* Pet. App. 3a; 725 ILCS 150/5, 150/6. In fact, the government routinely avails itself of a variety of extensions provided by the statute, *see* 725 ILCS 150/10, 150/9(F), including a stay of the statutory deadlines when the property seized may be used for evidence. *See* 725 ILCS 150/10.

based on the then-controlling decision *Jones v. Takaki*, 38 F.3d 321 (7th Cir. 1994).

The Seventh Circuit reversed. After re-examining the reasoning of *Jones*, the Seventh Circuit concluded that DAFPA fails to satisfy the limitations that the Due Process Clause imposes on civil asset forfeiture. Pet. App. 10a. The court of appeals applied this Court's familiar due process test, articulated in *Mathews v. Eldridge*, 424 U.S. 319 (1976), and held that the government must provide property owners with a preliminary opportunity to be heard—at which they can seek the temporary return of their property subject to whatever conditions the court might deem equitable—prior to the full forfeiture hearing, which may not occur for months or years.

The court of appeals focused its analysis of the *Eldridge* factors most explicitly on the seizure of automobiles and remanded the case to the district court with instructions to "fashion appropriate procedural relief" in the form of a hearing that "should be prompt but need not be formal." Pet. App. 10a. In finding that DAFPA requires additional procedural protection and remanding the case to the district court, the court of appeals did not specify the contours or the time frame of this preliminary opportunity to be heard, stating only that due process requires "some sort of mechanism to test the validity of the retention of the property." *Id.* However, the decision does provide clear guidance to the district court about one issue: "We do not envision . . . duplicat[ing] the final forfeiture hearing." *Id.*

This Court granted *certiorari* to review the narrow question of whether the court of appeals properly selected the traditional *Eldridge* test in adjudicating the due process question or, alternatively, should have chosen the standard developed in *Barker v. Wingo*, 407 U.S. 514 (1972), for analyzing speedy trial rights. Weighing in as *amicus curiae* for Petitioners, the United States argues: (1) that the court of appeals erred because the new procedure its holding requires would needlessly replicate and unfairly expedite the ultimate forfeiture proceeding; (2) that the choice between *Eldridge* and *Barker* is irrelevant; and (3) that, whether *Eldridge* governs or not, due process challenges to a forfeiture statute may only be directed at the facts of individual applications of the statute.

Amici ACLU and ACLU of Illinois submit this brief in support of Respondents to address these three points.

SUMMARY OF ARGUMENT

This brief is narrowly directed, first, at correcting Petitioners' and the United States' mistaken assumption that a prompt preliminary hearing after property is seized would replicate the full forfeiture hearing that comes months or years later. Second, we explain that *Mathews v. Eldridge* provides the appropriate framework for analyzing whether a new interim procedure should be created for a category of claimants and that, contrary to the suggestion of the United States, the choice between *Eldridge* and other tests is a consequential one.

Finally, we address the United States' erroneous suggestion that the constitutionally required procedures for property owners in forfeiture proceedings can only be adjudicated on a case-by-case basis.

The court of appeals issued a broad, flexible directive to the district court, requiring it, in collaboration with the parties, to craft an interim proceeding that would allow appropriate claimants to seek the temporary return of their property, pending the final outcome of their forfeiture proceedings. This modest preliminary proceeding has almost nothing in common with the eventual adjudication of a forfeiture claim, and the addition of an interim step of this kind certainly cannot be characterized as merely moving forward the date of the full-fledged forfeiture proceedings that will determine the final status of the seized property.

Once it becomes clear that the envisioned preliminary hearing is distinct from the final adjudication of a forfeiture claim, *Eldridge* emerges as the appropriate test to use in deciding whether a forfeiture statute provides constitutionally adequate process to a category of property owners. By design, *Eldridge* adjudicates rights categorically. *Barker*, by contrast, adjudicates rights on an individualized basis, and is therefore unsuitable in this context. Under the *Eldridge* test, the interest of claimants—and certainly the interest of automobile owners who were the focus of the decision below—in having an interim proceeding to regain temporary use of their property outweighs the government interest in

retaining the property pending a final adjudication in all cases.

Finally, the United States raises a significant, but ultimately irrelevant, distinction between facial invalidation of DAFPA (which the United States believes the court of appeals ordered) and individualized adjudication of Respondents' claims (which the United States contends is the exclusive mode of analysis available to personal property owners claiming violations of due process). The remedy ordered by the court of appeals does not invalidate DAFPA, facially or otherwise. To the contrary, the remedial order is both deferential and flexible. Furthermore, as the United States itself recognizes, the choice between total facial invalidation and individualized relief is a false dichotomy. In many areas of constitutional adjudication, including forfeiture, this Court and lower courts have steered a middle course by ordering relief for a category of claimants whose rights have been abridged and whose constitutional claim does not depend on individual circumstances. At a minimum, this Court should follow that approach here and uphold the right of automobile owners to a preliminary retention hearing that they are now denied under DAFPA.

ARGUMENT

I. A PRELIMINARY OPPORTUNITY FOR PROPERTY OWNERS TO TEST THE RETENTION OF THEIR PROPERTY BY THE STATE WILL NOT REPLICATE THE SUBSEQUENT FORFEITURE PROCEEDING.

In finding that due process requires "some sort of mechanism to test the validity of the retention of [seized] property," the court of appeals directed the district court to fashion a preliminary hearing that does *not* "duplicate the final forfeiture hearing." Pet. App. 10a. Petitioners claim that inevitably the preliminary and final hearings will be duplicative and that "the requirement of an interim hearing does nothing more than move up the date of the civil forfeiture hearing." Pet'r Br. 47. The United States joins in this prediction. Br. of the United States [hereinafter "U.S. Br."] 8 n.1 ("[A]t the additional, preliminary hearings that Respondents seek, the State's burden (probable cause) would be precisely the same [as in the final forfeiture proceeding].").[3]

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[3] The *amicus* brief filed by several States in support of Petitioner likewise adopts the faulty assumption that the interim proceeding would require an "adversarial, 'probable cause to detain' hearing." Br. for the States of Illinois, Alabama, Arizona, *et al.* 1. With that faulty assumption, the States maintain that the most states' procedures fall "well short of what the Seventh Circuit's new due process rule seems to anticipate." *Id.* at 2. The States misinterpret the court of appeals ruling, imagining a kind of hearing that the court's own words do not support. As we demonstrate below, a modest interim procedure, allowing for use of the property during the pendency of protracted forfeiture proceedings, comports with

On the assumption that the preliminary and final hearings are substantively duplicative, the United States infers that Respondents' "due process challenge concerns only the *timing* of forfeiture proceedings." U.S. Br. 9 (emphasis in original). So characterized, it is far easier to argue that Respondents' claim would logically be controlled by this Court's precedents about the timing of forfeiture proceedings.

However, the United States' (and Petitioners') premise is incorrect: The interim measures envisioned in the present case (and utilized already in the federal system and a number of states) do *not* duplicate final forfeiture proceedings, and therefore this Court's precedents on the timing of final forfeiture proceedings do not control the analysis in the present matter. The district court, in following the appeals court's direction that, "with the help of the parties," it "should fashion appropriate procedural relief," Pet. App. 10a, could implement any of a number of interim measures, analogous to many such measures already in place under federal law and the laws of various states, that do not replicate the ultimate forfeiture proceeding.

The differences between such interim measures and the final forfeiture adjudication under Illinois law are significant. A full forfeiture hearing

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the practice of most states. *See infra* note 5. Indeed, it is not clear that *any* other state (aside from Illinois) has a forfeiture statute under which claimants wait such a protracted period with no opportunity to request the continued use of their property.

under DAFPA includes a government forfeiture complaint, answers from the property owner and any interest holders, and an adversarial hearing with evidentiary burden-shifting as to probable cause and exemptions. 725 ILCS 150/9. By contrast, the preliminary proceeding foreseen by the court of appeals "need not be formal." Pet. App. 10a. As the court explained, one appropriate consideration at a preliminary proceeding would be "to see whether a bond or an order can be fashioned to allow the legitimate use of the property while the forfeiture proceeding is pending." *Id.* This interim measure need not call for any finding on the existence of probable cause *vel non* (as Petitioners and the United States speculate would be the case, *see* Pet'r Br. 47-48; U.S. Br. 8 n.1), nor force the government to show its hand as to its upcoming criminal case (as the United States suggests, U.S. Br. 15). *See* Pet. App. 10a ("We do not envision lengthy evidentiary battles[.]"). Nor did the court of appeals set any specific time frame for the interim proceedings other than to require that it be "prompt." *Id.* Thus, far from requiring an adjudication of the ultimate merits of the forfeiture action, the interim step envisioned by the court of appeals would merely provide a property owner the opportunity to make a case for continued use of her property while the full-fledged forfeiture proceeding unfolds.[4]

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[4] The United States' and Petitioners' misperceptions about the scope of the interim proceeding may arise from the appeals court's statement that "plaintiffs . . . claim[] that . . . due process requires that they be given a prompt, postseizure, *probable cause* hearing." Pet. App. 2a (emphasis added).

Models for the type of interim remedy the district court could design are in abundance throughout federal and state law. *See, e.g.*, U.S. Br. 30-32 (discussing interim remedies under federal law). Under federal civil forfeiture practice, for example, claimants have several interim means of securing access to their property. The federal hardship provision allows that a "claimant . . . is entitled to immediate release of seized property if . . . the continued possession by the Government pending the final disposition of forfeiture proceedings will cause substantial hardship to the claimant, such as preventing the functioning of a business, preventing an individual from working, or leaving an individual homeless." 18 U.S.C. § 983(f)(1)(C). Federal Rule of Criminal Procedure 41(g) creates a bond procedure whereby "the court must return the property to the movant, but may impose reasonable conditions to protect access to the property and its use in later proceedings." Far from duplicating the eventual

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However, as noted above, nothing in the relief ordered by the court envisions a probable cause hearing. Further, the court described the federal procedures providing for "release of [an] automobile prior to the actual forfeiture hearing" as "relief similar to that which the plaintiffs in this case seek." *Id.* at 7a. The court continued: "It is hard to see any reason why an automobile, not needed as evidence, should not be released with a bond or an order forbidding its disposal." *Id.* at 8a. Again, the court made no suggestion that the interim hearing will involve any evaluation of the merits of the government's case. On balance, it appears that, regardless of the scope of relief originally sought by plaintiffs, the court of appeals clearly envisioned a modest, limited interim procedure focused on temporary return of property subject to appropriate conditions, not a probable cause hearing.

forfeiture hearing, these measures merely allow an aggrieved property owner the opportunity to make an equitable showing that temporary return of her property is fair, appropriate and not unduly harmful to the government's interest. Approximately half of all states likewise provide for similar interim proceedings that do not adjudicate the merits of the ultimate forfeiture action.[5]

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[5] A state-by-state review of forfeiture procedures debunks the fears of the State *amici* that a ruling for Respondents here would place many state forfeiture statutes in constitutional jeopardy. *See* Br. for the States of Illinois, Alabama, Arizona, *et al.* 3. The following 23 states provide for a prompt opportunity for a property owner (or, more narrowly, an automobile owner) to seek temporary return of property, subject to appropriate conditions: Alabama (automobiles only), Alaska, Arizona, California, Connecticut (stolen property only), Delaware, Florida, Georgia, Iowa, Kansas, Louisiana, Minnesota, Missouri, Nebraska, New Jersey, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, Texas, Utah and Virginia. The following 16 states explicitly require or provide that the government institute forfeiture proceedings well in advance of Illinois' 187 days: Arkansas, Colorado, Idaho, Indiana (timeline begins upon property demand by owner), Maryland, Mississippi, Montana, Nevada, New Hampshire, New Mexico, New York (timeline begins upon property demand by owner), South Dakota, Vermont, Washington, West Virginia and Wisconsin. In the following 5 states, although the law does not set forth a specific number of days for the government to institute forfeiture proceedings, the relevant statute requires that it must be done "promptly": Massachusetts, Michigan, North Dakota, Tennessee and Wyoming. In 2 states, Hawaii and Rhode Island, claimants can file mitigation or remission petitions. The attached table cites the relevant statutes for each state and briefly describes the procedures in each. *See* Appendix A.

Access to these intermediate forms of relief is particularly important for innocent owners of automobiles and would bring Illinois law into line with the practice of the federal government and other states. When the automobiles of innocent owners like Respondents Smith, Perez and Brunston are seized under DAFPA, they may wait months or even years before they are able to regain possession of their property. During that time, many innocent automobile owners who depend on the use of their vehicles to maintain their employment will face significant—and completely undeserved—hardship. As the court of appeals explained, "[t]he hardship posed by the loss of one's means of transportation, even in a city . . . with a well-developed mass transportation system, is hard to calculate." Pet. App. 8a. The reason is self-evident. "Our society is . . . highly dependent on the automobile" and losing it "can result in missed doctor's appointments, missed school, and perhaps most significant of all, loss of employment." *Id.*

Other courts have recognized the unique importance of automobiles as well. "Automobiles occupy a central place in the lives of most Americans, providing access to jobs, schools, and recreation as well as to the daily necessities of life." *Coleman v. Watt*, 40 F.3d 255, 260-61 (8th Cir. 1994); *see also Krimstock v. Kelly*, 306 F.3d 40, 61 (2d Cir. 2002) ("The particular importance of motor vehicles derives from their use as . . . for some, the means to earn a livelihood."); *Stypmann v. San Francisco*, 557 F.2d 1338, 1342-43 (9th Cir. 1977) (finding a "substantial" interest in the "uninterrupted use of an automobile,"

upon which the owner's "ability to make a living" may depend). By allowing claimants to put forward such factors as their innocent ownership, the hardship they face, and their ability to post a bond, an interim hearing under DAFPA would give automobile owners an opportunity to retain the use of their vehicles, subject to conditions a judge may deem appropriate, while the ultimate forfeiture proceeding is pending.

Petitioners' and the United States' mistaken belief that a preliminary opportunity to be heard would serve simply to "move up the date of the civil forfeiture hearing," leads them to the equally mistaken conclusion that *United States v. $8,850 in U.S. Currency,* 461 U.S. 555 (1983), is controlling in the present case. Pet'r Br. 47; *see also* U.S. Br. 8, n.1 (claiming that the government's burden of proof at a preliminary hearing "would be precisely the same" as it is at the forfeiture hearing). In *$8,850,* the Court held that claimants must prove specific individualized facts, particular to the circumstances of their cases, in order to challenge the overall time the government takes to file forfeiture proceedings. *See* 461 U.S. at 555-56 (citing *Barker v. Wingo,* 407 U.S. 514 (1972)). The claimant in *$8,850* did not ask for creation of an intermediate hearing to allow temporary use of her property; indeed, as the United States recognizes, for the claimant in *$8,850* "several interim measures [were already] available." U.S. Br. 30. Rather, the claimant in *$8,850* urged the more rapid conclusion of the overall forfeiture process in her particular case. As the Court remarked several

times, "[t]he due process issue presented here is a narrow one." *$8,850*, 461 U.S. at 562.

If the preliminary hearing in the present case were merely an attempt to speed up the forfeiture hearing, one could more readily appreciate the argument that *$8,850* should guide the Court's decision here. However, as previously discussed, there is ample space for the district court to fashion an interim proceeding that is entirely distinct from the full forfeiture hearing. As the Second Circuit explained in reaching a holding similar to the Seventh Circuit's in the instant matter, *$8,850* is not controlling in this context because Respondents'

> claim does not concern the speed with which civil forfeiture proceedings themselves are instituted or conducted. Instead, [claimants] seek a prompt post-seizure opportunity to challenge the legitimacy of the [government's] retention of the vehicles while those proceedings are conducted. . . . The Constitution [] distinguishes between the need for prompt review of the propriety of continued government custody, on the one hand, and delays in rendering final judgment, on the other.

Krimstock, 306 F.3d at 68. Thus, Petitioners' assertion that "any challenge to the length of the delay in commencing the forfeiture hearing should be analyzed under . . . *Barker*," as it was in *$8,850*, Pet'r Br. 26, fails to justify the use of *Barker* in this case because the question here is not about the delay in the existing forfeiture proceeding. Rather, this case

is about the necessity of adding a new procedure—a preliminary opportunity for owners to test the validity of the government's continued possession of their property.

II. IN EVALUATING THE DUE PROCESS RIGHT TO CREATION OF A NEW PROCEDURE, COURTS RELY ON THE CATEGORICAL ANALYSIS OF *ELDRIDGE*, NOT ON THE HIGHLY INDIVIDUALIZED ANALYSIS OF *BARKER*.

Given that the preliminary hearing envisioned by the court of appeals is a form of relief that would be generically applicable to many claimants (either broadly for all claimants or for certain categories of claimants) and is unconnected to the final disposition of any particular forfeiture proceeding, the Court should adopt a mode of analysis that allows a general weighing of interests rather than a narrow test that examines only the circumstances of particular individuals. Put another way, this Court should ask questions at the same level of generality as the answer it is called upon to give. *Mathews v. Eldridge* provides the structure for this more general analysis, insofar as it has long guided judicial evaluation of the need for creating procedures for a broad category of claims. By contrast, the *Barker* test requires the examination of an array of highly individualized facts unique to a particular litigant in deciding whether that litigant deserves speedier relief under existing procedures.

The Court has consistently turned to the *Eldridge* test when assessing the constitutional

adequacy of a given procedure for a broad category of claimants and, in particular, when assessing whether a procedural framework provides an adequate opportunity for a category of claimants to be heard in defense of their protected interests. Finally, the United States' attempt to sidestep the *Eldridge-Barker* question by arguing that the two tests collapse into a single one is wholly unpersuasive: not only are the differences between the two tests apparent on their face, but the United States' effort to merge them yields an entirely new test that resembles neither of the originals and merely provides a convenient vehicle for near-total deference to the status quo.

A. *The Court Should Use the Eldridge Test Because It Involves Analysis at the Appropriate Level of Generality; By Contrast, Barker Is an Ad Hoc Test That Requires Analysis of the Individual Circumstances of Particular Claimants.*

The decision to create a new interim procedure under DAFPA does not turn on the facts of individual cases. Accordingly, the test employed to answer the question in this case should be one that turns on an analysis applicable to claimants (or categories of claimants) generally, not one that turns on the seizure of property from any particular property owner. That is, the answer must be ascertained using a test that operates at the same level of generality as the question itself.

The *Eldridge* test operates at this level of generality, "weighing [the] fiscal and administrative burdens against the interests of a particular *category*

of claimants." *Eldridge*, 424 U.S. at 348 (emphasis added). The Court's application of the test in *Eldridge* itself illustrates this generic mode of analysis. For example, the first prong of the test weighs "the private interest that will be affected by the official action." *Id.* at 335. In *Eldridge*, the Court did not ask or reason about George Eldridge's individual interest in not losing his Social Security disability benefits before he had an opportunity to be heard. Rather, the Court discussed the generalized interests of Social Security disability benefit recipients as a category: "In view of the . . . typically modest resources of the family unit of the physically disabled worker, the hardship imposed upon the erroneously terminated disability recipient may be significant." *Id.* at 342. As in *Eldridge*, the set of private interests implicated by this case are not unique to these Respondents but are instead shared among a larger, well-defined group: all individuals whose personal property is seized under Illinois law (or, if this Court prefers to rule more narrowly, all individuals whose cars are seized under Illinois law). The *Eldridge* test properly frames an analysis of private interests that apply equally among a group of claimants.

By sharp contrast, the *Barker* test requires a court to scrutinize the individualized facts and idiosyncratic circumstances presented in a particular case. In *Barker v. Wingo*, 407 U.S. 514 (1972), the Court set out a list of criteria that judges should use in deciding whether an accused's Sixth Amendment Speedy Trial right has been violated, with each claim examined on an individual case-by-case basis.

Justice Powell explained that the *Barker* "test necessarily compels courts to approach speedy trial cases on an *ad hoc* basis. We can do little more than identify some of the factors which courts should assess in determining whether a *particular* defendant has been deprived of his right." *Id.* at 530 (emphasis added); *see also Vermont v. Brillon*, 129 S. Ct. 1283, 1291 (2009) ("*Barker*'s formulation 'necessarily compels courts to approach speedy trial cases on an *ad hoc* basis.'" (quoting *Barker*, 407 U.S. at 530)).

This *ad hoc* test focuses on four factors: the length of the delay between arrest and trial, the reason for the delay, the defendant's assertion of his or her right, and prejudice to the defendant resulting from the delay. *Barker*, 407 U.S. at 530. None of these factors applies generically to test the nature of private or governmental interests in general; rather, these factors were designed and used in *Barker* for a fact-specific examination of the record. Thus, the Court observed that "[o]nly seven months" of the five-year delay between the arrest and trial of Willie Mae Barker "can be attributed to a strong excuse, the illness of the ex[-]sheriff who was in charge of the investigation." *Id.* at 533-34.

The Court has extended its use of the *Barker* test to *ad hoc* forfeiture challenges, but only where the claimant objected to the length of the overall forfeiture proceeding in his individual case. *See United States v. $8,850 in U.S. Currency*, 461 U.S. 555 (1983); *United States v. Von Neumann*, 474 U.S. 242 (1986). In both *$8,850* and *Von Neumann*, individual claimants challenged a forfeiture process

as it unfolded in their particular situations, just as a criminal defendant raising a speedy trial claim challenges the propriety of particular trial delays in that defendant's case. When considering the reason for the government's delay in *$8,850*, the Court explained that there was "both a pending petition for mitigation or remission and a pending criminal proceeding," and "[t]his investigation required responses to inquires to state, federal and Canadian law enforcement officers." *$8,850*, 461 U.S. at 577. "[T]hese elements," the Court wrote, "are guides in balancing the interests of the claimant and the Government to assess whether the basic due process requirement of fairness has been satisfied *in a particular case*." *Id.* at 565 (emphasis added). Moreover, in evaluating the claimant's assertion of her right to bring the forfeiture proceeding to a definitive conclusion—and enumerating the various types of interim relief she could have pursued under the federal law—the Court highlighted the fact that "[the claimant] did none of these things and only occasionally inquired about the result of the petition for remission." *Id.* at 569.

The *Barker* test simply does not apply when a case turns on generalized considerations applicable to a whole category of claimants; that is, when individual circumstances are immaterial to the analysis. The Court used the *Barker* test in *$8,850* and *Von Neumann* because those were *ad hoc* challenges, not because they were forfeiture cases. At no time has the Court suggested that the *Barker* test is appropriate in all forfeiture cases. On the contrary: this Court used *Eldridge*, not *Barker*, in

United States v. James Daniel Good Real Property, 510 U.S. 43 (1993), a forfeiture case more recent than both *$8,850* and *Von Neumann*. As discussed more fully below, *see infra* Part III, *Good Real Property* held that, under the analysis prescribed by *Eldridge*, due process requires that owners of real property receive notice and a hearing before their property is seized for forfeiture proceedings. *Id.* at 46, 53-59. Thus, *Good Real Property* demonstrates that *$8,850* and *Von Neumann* do not require the use of *Barker* in all forfeiture cases, just forfeiture cases about the timing of proceedings in a particular individual's case. The issue in this case is not whether proceedings moved quickly enough in the individual Respondents' cases, but rather whether Illinois' present set of forfeiture procedures is constitutionally adequate as a general matter for *all* owners of personal property, or at least all automobile owners, in the state. Described by the Court at its inception as "*ad hoc*," the *Barker* test is wholly ill-suited to adjudicating due process rights on a categorical basis, as this case requires.

B. Eldridge Is the Standard Test This Court Uses To Determine Whether a Statute Provides Individuals with an Adequate Opportunity To Be Heard.

"The fundamental requisite of due process of law is the opportunity to be heard." *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 466 (2000) (citations and internal quotation marks omitted). This case raises the question whether DAFPA provides an adequate opportunity to be heard when a property owner (especially an automobile owner) seeks to retain use

of her property during the pendency of the forfeiture proceeding. *Eldridge* is the standard test that this Court uses to answer such questions. *See, e.g.*, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985).

Although the *Eldridge* test originated in the administrative law context, this Court has since used it in a wide variety of cases involving the due process requirement of an adequate opportunity to be heard, from the right of public employees to be heard regarding their termination, *see Loudermill*, 470 U.S. at 535 (using *Eldridge* to decide "what pretermination process must be accorded a public employee who can be discharged only for cause"), to "the question of what process is constitutionally due to a citizen who disputes his enemy-combatant status" where the citizen argued "that he [was] owed a meaningful and timely hearing." *Hamdi*, 542 U.S. at 524 (plurality opinion). As demonstrated by *Good Real Property*, a property owner's opportunity to seek return of her property during the pendency of forfeiture proceedings falls comfortably within this range of applications of *Eldridge*. *See* 510 U.S. at 53-59. On only rare occasions has the Court explicitly declined to use *Eldridge* in due process cases, and none of these cases involved a due process right to be heard of the sort involved in this case.[6]

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[6] *See Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49 (2005) (declining to use *Eldridge* and finding no constitutional issue regarding the burden of persuasion in a dispute over the appropriateness of an individualized education program under

Because *Eldridge* functions at the appropriate level of generality, and because this Court routinely uses it in due process cases concerning the right to be heard, it is the proper test for adjudicating whether DAFPA adequately protects property owners' due process rights during the pendency of forfeiture proceedings.

C. *Contrary to the Position of the United States, the Choice Between Eldridge and Barker Is Consequential to the Due Process Analysis.*

The United States devotes much of its brief to urging this Court that the question on which it granted review—*i.e.*, whether *Eldridge* or *Barker* is the appropriate test—is an irrelevant one, because, according to the United States, the analysis under either test is the same. *See, e.g.*, U.S. Br. 7-9.

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the Individuals with Disabilities in Education Act); *Dusenbery v. United States*, 534 U.S. 161 (2002) (declining to use *Eldridge* to determine the adequacy of notice provided to a federal inmate whose property was being forfeited); *Weiss v. United States*, 510 U.S. 163 (1994) (declining to use *Eldridge* in deciding whether the lack of a fixed term of office for military judges violated due process); *Medina v. California*, 505 U.S. 437 (1992) (declining to use *Eldridge* to rule on the validity of an evidentiary burden imposed by a state criminal procedural rule); *Atkins v. Parker*, 472 U.S. 115 (1985) (the Court did not use *Eldridge* to determine the adequacy of notice provided to food stamp recipients about a change in entitlement); *Black v. Romano*, 471 U.S. 606 (1985) (the Court did not use *Eldridge* in deciding whether a sentencing court must indicate that it has considered alternatives to incarceration before revoking probation).

However, even a cursory comparison between the two tests reveals that the implicit premise underlying the question presented—namely, that the choice of test is a consequential one—is correct. Moreover, the United States' attempt to collapse the two opposing tests into one produces a third standard that is a far cry from either the *Eldridge* or *Barker* test, and all but entirely squeezes out consideration of private property interests.

The time-honored *Eldridge* test for analyzing due process claims requires a balancing of three generalized factors: the private interest, the government interest, and a comparison of the degree to which the existing procedures and any additional procedures protect against erroneous deprivation of the individual's interest. *Eldridge*, 424 U.S. at 335. By contrast, as discussed in more detail in the previous section, the *Barker* test analyzes only the particular circumstances of a specific case: the length of the delay in one person's case, the reason for that particular delay, whether that individual has asserted his or her right, and any prejudice to that individual resulting from the delay. *See Barker*, 407 U.S. at 530. The contrast between the two tests could not be clearer: one evaluates and compares private and government interests at a systemic level; the other considers the idiosyncratic facts of particular cases.

In attempting to collapse these two distinct tests into a single one, the United States actually creates a third test that resembles neither *Eldridge* nor *Barker*. Instead, the United States asks this Court to focus primarily—and deferentially—on the

interest of the government in the status quo, with minimal consideration of the shared interest of a category of individuals who are adversely affected by a paucity of process. *See, e.g.*, U.S. Br. 9 (proposing that this Court follow cases the United States characterizes as having "focused principally on the strength of the governmental interests at stake"). More specifically, according to the United States, this Court should consider only whether the time limits provided "are justified on their face by valid government interests." *Id.* at 19. This standard's extraordinary deference to the status quo is apparent both from the wording of the test, which asks for no more than a surface ("on their face") examination of the governmental interests justifying current procedures, and from the United States' application of its newly-minted standard, an application in which the United States believes that an unadorned recitation of government interests suffices to justify DAFPA, even though the Illinois law provides far less process than the corresponding federal statute. *See, e.g., id.* at 20 (arguing that "[t]he government has valid interests in identifying and contacting potential claimants before initiating a judicial proceeding"); *id.* at 24 (arguing that "[t]he government has valid interests in coordinating forfeiture proceedings with related matters"); *id.* at 26 (arguing that "[t]he government has valid interests in maintaining interim custody of personal property"). The United States makes a brief gesture toward acknowledging property owners' interest in their automobiles, but then dismisses this interest as "irrelevant." *Id.* at 27. Thus, under the novel standard the United States proposes, courts would

skip two of the three *Eldridge* factors in evaluating the need for an interim proceeding at which claimants could seek temporary custody of their property: the court would merely identify valid government interests, without balancing the government's interests against private interests or considering the efficacy of the interim procedures in preventing erroneous deprivations of property.

The United States' purported amalgamation of the *Eldridge* and *Barker* tests invites this Court to disregard the legitimate and weighty interests of private property owners. The fact that the attempted merging of the two tests produces a third creature that is neither fish nor fowl only underscores the important differences between the two tests and the importance of choosing correctly between them, as this Court implicitly acknowledged in its grant of *certiorari*. Because *Eldridge* is the test better suited to due process claims of a categorical nature, and because *Eldridge* is the standard and long-standing test for due process claims regarding the right to be heard, the appeals court's decision to apply the *Eldridge* test was correct. As Respondents' brief makes clear (and we do not repeat here), the application of all of the *Eldridge* factors supports the ruling below that some sort of interim hearing is appropriate, at least for some claimants (who can be defined categorically). *See also* Pet. App. 4a-9a (appeals court's application of the *Eldridge* factors); *Krimstock v. Kelly*, 306 F.3d 40, 67 (2d Cir. 2002) (same).

III. DAFPA'S CONSTITUTIONAL SUFFICIENCY CAN BE ADJUDICATED AS-APPLIED TO A CLEARLY DEFINED CATEGORY OF SEIZURES.

The United States raises a potentially distracting, but ultimately inapposite, distinction between the purported facial invalidation of DAFPA for its lack of a preliminary hearing procedure and the government's preferred form of relief—narrow, case-specific relief—directed at individual litigants who seek a preliminary hearing. *See* U.S. Br. 6 (objecting to holding that "the Illinois DAFPA procedure is facially invalid," and arguing that the question of whether a forfeiture statute provides constitutionally adequate procedures to property owners "turns on the facts of a particular case").

Contrary to the United States' characterization, the appeals court's requirement of "some sort of mechanism to test the validity of the retention of property," Pet. App. 10a, falls considerably short of facial invalidation of the statute. It envisions a modest procedure, quite possibly for only some categories of claimants, while leaving in place all of the mechanisms and timelines of the pre-existing forfeiture statute. Even if one were to assume the worst—*i.e.*, predict that the district court on remand would somehow facially invalidate the statute—and if this Court were to believe that such a remedy reaches too far, it does not necessarily follow that the only alternative is to evaluate, case-by-case, whether particular litigants are entitled to a preliminary hearing. The United States' invocation of these two poles—facial

invalidation and individual adjudication—erroneously suggests that these are the only options. They are not.

In rejecting facial invalidation, the United States implies that individualized decisions are the only alternative. This in turn pushes powerfully toward using *Barker*, a test designed to weigh individual factors. But there is another approach—one that the United States briefly acknowledges to be a theoretical option—that is better suited to this case: to consider categories of claims, particularly the category of automobile owners, who have a set of interests that is distinct from those of other property owners yet common among automobile-owner claimants, in the temporary return of their property. *See* U.S. Br. at 27, 29 (acknowledging the possibility of "a categorical rule affording greater protection to automobiles," to account for the fact that the seizure of other types of personal property "may be a less severe hardship than the seizure of an automobile"). A categorical analysis of this type is a practical way for resolving the issue before this Court, as it preserves the legislature's work by respecting its overall intent while curing constitutional defects in a narrow, targeted manner. The structure of this approach has been used already in forfeiture cases, and it is a common method of constitutional adjudication in many contexts.

This Court's due process jurisprudence concerning property owners recognizes that it would be inappropriate to restrict the evaluation of property owners' rights to individualized analyses in all instances. The Court's decision in *United States*

v. James Daniel Good Real Property, 510 U.S. 43 (1993)—handed down ten years after *$8,850*—illustrates an appropriate occasion for imposing a categorical rule in a forfeiture case, rather than mimicking the individualized analysis of *$8,850*. In *Good Real Property*, a homeowner alleged that the government violated his due process rights when it seized his home without first providing him with notice and a hearing. Even though the claimant "raise[d] an as applied challenge to the statute," the Court recognized the applicability of its analysis to a broader group. *Id.* at 62. The Court categorically "h[e]ld that the seizure of real property . . . is not one of those extraordinary instances that justify the postponement of notice and hearing." *Id.* Specifying the scope of its holding, the Court explained that "[t]he constitutional limitations we enforce in this case apply to real property in general, not simply to residences," *id.* at 61, and *a fortiori* not simply to the residence of James Daniel Good. If the United States were correct that this Court only considers due process challenges to forfeiture on a case-by-case basis, then the holding should have applied only to the individual case of Mr. Good, not to the category of all real property owners. Instead, where the Court was called upon to answer a question of general application concerning procedures of a forfeiture statute, it did so in a manner that gave clear, categorical guidance to government actors who then had to administer that statute.

Good Real Property involved the seizure and forfeiture of real property; Respondents' case involves the seizure and forfeiture of personal

property. Concededly, due process requirements in the forfeiture context differ for real versus personal property, most significantly in that the government can seize personal property without *prior* notice or a hearing. *See Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974). But the scope and structure of this Court's analysis of a due process claim—*i.e.*, the evaluation of whether procedures are adequate for a category of claimants, as opposed to only for individuals—is unrelated to the question of whether owners of different types of property are entitled to notice or a hearing at a different point in the forfeiture process. There is nothing in the Court's jurisprudence to suggest that the constitutionality of a personal property forfeiture statute can only be considered on specific facts, while the constitutionality of a real property forfeiture statute can be considered more broadly, as the Court did in *Good Real Property*.

This Court's recent holding in *Jones v. Flowers*, 547 U.S. 220 (2006), provides another example of a case in which a due process challenge to a government seizure was considered and resolved on a categorical basis. In *Jones*, an individual property owner challenged the adequacy of notice under Arkansas law prior to the tax sale of his property. *Id.* at 224. When Jones was no longer living in the house, the state twice sent notice by certified mail that his house would be subject to a tax sale if he failed to pay delinquent property taxes. *Id.* at 223-24. Even though Jones' estranged wife continued to live in the house, the certified mail was returned unclaimed both times and Jones did not actually

learn of the tax sale until an unlawful detainer was served on his daughter, who also continued to live in the house. *Id.* In light of these facts, the Court could have rendered a narrow holding regarding the particular circumstances of Jones' case, focusing for instance on such highly individualized factors as the continued residency of his ex-wife and daughter in the house. Instead, the Court decreed a categorical rule: "We hold that when mailed notice of a tax sale is returned unclaimed, the State must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is practicable to do so." *Id.* at 225. The Court reached this conclusion based on general observations, applicable to any property owner for whom notice is returned unclaimed. *See, e.g., id.* at 230 ("[W]hen a letter is returned by the post office, the sender will ordinarily attempt to resend it, if it is practicable to do so."); *id.* ("[I]f a feature of the State's chosen procedure is that it promptly provides additional information to the government about the effectiveness of notice, it does not contravene the *ex ante* principle to consider what the government does with that information in assessing the adequacy of the chosen procedure."). As a result of the *Jones* ruling, Arkansas now provides a modified notice procedure for the category of property owners whose notice by certified mail is returned unclaimed. Ark. Code Ann. § 26-37-301.

This Court's categorical approach has not been limited to property cases. In other contexts, as well, the Court has recognized that statutes can be unconstitutional as applied to a well-defined category

of persons or behaviors and, on that basis, has crafted appropriate categorical relief. *See, e.g.*, *Tennessee v. Garner*, 471 U.S. 1, 11-12 (1985) (holding that a state statute authorizing the use of all "necessary means" to effect an arrest when the suspect flees or forcibly resists was unconstitutional "insofar as it authorizes the use of deadly force against [all] fleeing suspect[s]," but that such force was appropriate "if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm . . . . As applied in such circumstances, the Tennessee statute would pass constitutional muster."); *Little v. Streater*, 452 U.S. 1, 3 (1981) (applying the *Eldridge* test to determine that a statute requiring litigants to pay for their own paternity tests violated due process only "when applied to deny [paternity] tests to indigent defendants" but upholding the statute as to non-indigent defendants); *United States v. Grace*, 461 U.S. 171, 183 (1983) (striking down application of a statute banning certain forms of speech on Supreme Court premises as "unconstitutional as-applied to . . . sidewalks" but upholding the statute as to the rest of the premises).[7]

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[7] In *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995), the Court declined to rule categorically, explaining that such a remedy is inappropriate when "Congress has sent inconsistent signals as to where the new [categorical] line or lines should be drawn." *Id.* at 479 n. 26. This case does not raise similar concerns. Far from sending inconsistent signals, the Illinois legislature itself has set the stage for this Court to identify automobiles as a well-defined category of

Consistent with *Good Real Property* and *Jones* in the forfeiture context and numerous examples throughout other areas of constitutional law in which the Court reasoned and ruled categorically—and therefore more generically than the individualized facts and circumstances of the claimant—this Court need not confine its consideration of DAFPA's constitutionality to the facts of the individual seizures and forfeitures involved in the instant case.

DAFPA's application. The statute requires that "[w]hen the property seized for forfeiture is a vehicle, the law enforcement agency seizing the property shall immediately notify the Secretary of State that forfeiture proceedings are pending regarding such vehicle." 725 ILCS 150/5. Under Illinois law, the Secretary of State is responsible for vehicle registration. 625 ILCS 5/2-101. DAFPA's unique notice provision appears to rest on the fact that the state can more easily ascertain ownership of vehicles, as compared to other property, through the state's vehicle registration system, but this special notice provision does not expedite the forfeiture process for vehicles under the current statute (and thus does not obviate the need for relief in this case). By imposing a categorically different notification requirement for vehicle seizures as opposed to all other seizures, the Illinois legislature demonstrated that it views vehicle seizures as a distinct category to which different requirements can apply.

CONCLUSION

For the reasons stated herein, the judgment of the Seventh Circuit should be affirmed.

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APPENDIX

Appendix A:

Statutory Civil Forfeiture Provisions

Alabama: Ala. Code § 28-4-287: A claimant may post bond to recover a seized vehicle pending the outcome of the forfeiture proceeding.

Alaska: Alaska Stat. § 17.30.118(a): A claimant may petition for release of seized property at any time.

Arizona: Ariz. Rev. Stat. Ann. § 13-4306(G): An owner of property seized for forfeiture may obtain the release of the seized property by posting bond.

Arkansas: Ark. Code Ann. §§ 5-64-505(f)(2)(C), (f)(4), (g)(2)(A): The government must initiate forfeiture proceeding within sixty-five days of seizure.

California: Cal. Health & Safety Code § 11488.4(g): Any person (other than a defendant) claiming an interest in seized property can move for the return of the property.

Colorado: Colo. Rev. Stat. Ann. § 16-13-505(2)(a): The government must initiate forfeiture proceedings within sixty days of seizure.

Connecticut: Conn. Gen. Stat. Ann. § 54-36a(2): If the seized property is stolen, the government must notify the owner within ten days of the seizure; notification must include a

form to request the return of the property, a request that must be ruled on within thirty days of filing.

Delaware: Del. Super. Ct. R. Civ. Proc. § 71.3(c): An interest holder may seek the return of property seized by the government by filing a civil petition within forty-five days of receiving notice of the seizure.

Florida: Fla. Stat. Ann. § 932.703(2)(a): Within fifteen days of receiving notice of a seizure, an interest holder has a right to request an adversarial preliminary hearing to determine whether probable cause exists to believe that property was properly seized so that the government may retain it pending the outcome of the final forfeiture proceeding; the government must hold that hearing within ten days of receiving the claimant's request, or as soon as practicable thereafter.

Georgia: Ga. Code Ann. § 16-13-49(q)(4): An interest holder whose property was seized without process can apply for a preliminary probable cause hearing that the court must hold within thirty days of the application.

Hawaii: Haw. Rev. Stat. § 712A-10(5): Any person claiming seized property may petition for remission or mitigation of the forfeiture.

Idaho: Idaho Code Ann. §§ 37-2744(b), (c)(3): When property is seized without process, the government must initiate forfeiture proceedings within thirty days.

Illinois: 725 Ill. Comp. Stat. 150/5, 6: For property worth less than $20,000, the

government must initiate forfeiture proceedings within 187 days.

Indiana: Ind. Code § 34-24-1-3(3)(a): After receiving written notice from the owner demanding return of seized property, the government must initiate forfeiture proceedings within ninety days.

Iowa: Iowa Code Ann. § 809.3(1): Any person claiming a right to possession of seized property may make application for its return.

Kansas: Kan. Stat. Ann. § 60-4112(c): An interest holder can obtain a preliminary probable cause hearing within thirty-five days of seizure, and if the court finds that probable cause does not exist, the government must release the property to the interest holder.

Kentucky: Ky. Rev. Stat. Ann. § 218A.415(1): Property seized shall be subject only to the orders of the court having jurisdiction over the forfeiture proceedings.

Louisiana: La. Rev. Stat. Ann. § 40:2611C: An interest holder can obtain a preliminary probable cause hearing within thirty-five days of seizure, and if the court finds that probable cause does not exist, the government must release the property to the interest holder.

Maine: Me. Rev. Stat. Ann. tit. 15, § 5823.2: When vehicles are seized, the seizing agency must file a report of seizure with the state attorney at least twenty-one days after the seizure; within twenty-one days of receiving the report, the state attorney must initiate

forfeiture proceedings and petition to perfect title.

Maryland: Md. Code Ann., Crim. Proc. § 12-304(b): The government must file a complaint for forfeiture within forty-five days of seizing a vehicle.

Massachusetts: Mass. Gen. Laws ch. 94C, § 47(d): The court shall "promptly" hold hearings on the government's petitions for forfeiture proceedings.

Michigan: Mich. Comp. Laws Ann. § 333.7523(1): Forfeiture proceedings must be instituted "promptly."

Minnesota: Minn. Stat. Ann. §§ 609.531(5a)(a), (b): An owner may post bond to have seized property returned before the forfeiture action is determined. The owner of a seized vehicle can regain possession of it pending the final resolution of the forfeiture proceeding by surrendering the vehicle's certificate of title.

Mississippi: Miss. Code Ann. § 41-29-177(1): For seized property other than a controlled substance, raw material or paraphernalia, the government must institute forfeiture proceedings within thirty days from seizure or the subject property shall be immediately returned to the party from whom seized.

Missouri: Mo. Rev. Stat. § 513.610.1: An interest holder can move to regain possession of seized property by posting bond.

Montana: Mont. Code Ann. § 44-12-201: For property other than controlled substances, the government must institute forfeiture proceedings within forty-five days of seizure.

Nebraska: Neb. Rev. Stat. § 28-431(4): At any time after seizure and prior to court disposition, the owner property may petition the court to release the property.

Nevada: Nev. Rev. Stat. § 179.1171(2): The government must initiate forfeiture proceedings within sixty days of seizure.

New Hampshire: N.H. Rev. Stat. § 318-B:17-b(II)(e): The government shall initiate forfeiture proceedings within sixty days of seizure.

New Jersey: N.J. Stat. Ann. § 2C:64-3(g): Any person with a property interest in the seized property, other than a defendant who is being prosecuted in connection with the seizure of property, may secure its release pending the forfeiture action by posting bond.

New Mexico: N.M. Stat. § 31-27-5(A): The government must institute forfeiture proceedings within thirty days of the seizure.

New York: N.Y. Pub. Health Law § 3388(4): The government must institute forfeiture proceedings within twenty days of a person's written demand claiming ownership.

North Carolina: N.C. Gen. Stat. Ann. §§ 18B-504(d), (h): Property can be released to owner on bond pending the outcome of the forfeiture trial; an innocent owner may apply

to protect his/her interest in the property at any time before forfeiture is ordered.

North Dakota: N.D. Cent. Code §§ 19-03.1-36(3), (4): Forfeiture proceedings must be instituted "promptly."

Ohio: Ohio Rev. Code. Ann. § 2981.03(A)(4): An interest holder may file a motion requesting return of property before a complaint seeking forfeiture is filed and a hearing shall be promptly scheduled at which interest holder must "demonstrate by a preponderance of the evidence that the seizure was unlawful and that the person is entitled to the property."

Oklahoma: Okla. Stat. Ann. tit. 63, §§ 2-506(B), (D), (F): A forfeiture proceeding will be set for hearing once the claimant files an answer to the state's notice of seizure.

Oregon: 2009 Or. Laws 78, § 16: Within fifteen days of notice of seizure, an interest holder can apply for a preliminary hearing to determine whether probable cause exists to believe that property was properly seized; if the court finds that probable cause does not exist, the property must be returned to the interest holder.

Pennsylvania: Pa. Stat. Ann. § 6802(k): An interest holder can petition the court for the release of the seized property.

Rhode Island: R.I. Gen. Laws § 21-28-5.04.2(h)(4): Interest holders can file petitions for remission or mitigation.

South Carolina: S.C. Code Ann. §§ 44-53-586(a), (b)(1): Owner can move to have seized property returned on various grounds including innocent ownership.

South Dakota: S.D. Codified Laws § 34-20B-76: The government must institute forfeiture proceedings within thirty days of seizure without process.

Tennessee: Tenn. Code Ann. § 53-11-451(c): Forfeiture proceedings must be instituted "promptly."

Texas: Tex. Code Crim. Proc. Ann. § 59.02(b): An interest holder can give bond for the replevin of any contraband other than evidence in a criminal proceeding or money.

Utah: Utah Code. Ann. §§ 24-1-7(5), (7)-(13): A property owner may post bond for the release of the seized property pending the forfeiture hearing; hardship relief is also available to obtain release of seized property.

Vermont: Vt. Stat. Ann. tit. 18, § 4243(a): The state must initiate forfeiture proceedings within 14 days of their authorization to seize the property.

Virginia: Va. Code. Ann. § 19.2-386.6: An interest holder is permitted to post bond to obtain property subject to forfeiture prior to the final hearing.

Washington: Wash. Rev. Code § 69.50.505(3): When property is seized without process, proceedings for forfeiture are deemed commenced by the seizure itself.

West Virginia: W. Va. Code § 60A-7-705(4): The government must initiate forfeiture proceedings within ninety days of seizure.

Wisconsin: Wis. Stat. § 961.555(2): The government must initiate forfeiture proceedings within thirty days of seizure.

Wyoming: Wyo. Stat. Ann. § 35-7-1049(c): Forfeiture proceedings must be instituted "promptly."

AMICUS CURIAE BRIEF

No. 08-351

In The Supreme Court of the United States

ANITA ALVAREZ, COOK COUNTY STATE'S ATTORNEY,

Petitioner,

v.

CHERMANE SMITH, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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QUESTION PRESENTED

Whether courts should apply the "speedy trial" test employed in *United States v. $8,850 in U.S. Currency*, 461 U.S. 555 (1983), and *Barker v. Wingo*, 407 U.S. 514 (1972), or the three-part due process analysis set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976), in determining whether the Due Process Clause requires a state or local government to provide owners of property seized for civil forfeiture with a post-seizure probable cause hearing before the actual forfeiture proceeding.

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725 Ill. Comp. Stat. Ann. 150/6(A) 4

725 Ill. Comp. Stat. Ann. 150/6(C) 4

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Cheh, Professor Mary M., *Can Something This Easy, Quick and Profitable Also Be Fair? Runaway Civil Forfeiture Stumbles on the Constitution*, 39 N.Y.L. Sch. L. Rev. 1 (1994).....30

Chicago Tribune, "Texas town stops black motorists, seizes assets," Mar. 13, 2009.....25

Daily Oklahoman, "Macy Seeks Ways to Handle Budget," Jan. 1, 1993 at 19.....34

Orange County Register, "When Police Take Property, Who Do You Call?," June 6, 1999 34

San Antonio Express-News, "Property Seizures Seen as Piracy," Feb. 7, 2009.....25

Smith, David B., *Prosecution and Defense of Forfeiture Cases*, Matthew Bender (Dec. 2008 ed.): 14, 24, 35

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INTEREST OF THE AMICI CURIAE

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, the Cato Institute publishes books and studies, conducts conferences, publishes the annual *Cato Supreme Court Review*, and files amicus briefs with the courts. This case is of particular interest to Cato because Cato scholars have written, spoken and testified often on behalf of civil assert forfeiture reform, and Cato published the book *Forfeiting Our Property Rights: Is Your Property Safe from Seizure?* (1995), authored by Rep. Henry J. Hyde, the principal sponsor of the federal Civil Asset Forfeiture Reform Act (2000).[1]

The Scharf-Norton Center for Constitutional Litigation is part of the Goldwater Institute, which is a tax exempt educational foundation under section 501(c)(3) of the Internal Revenue Code. The Goldwater Institute Scharf-Norton Center for Constitutional Litigation advances public policies that further

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[1] Pursuant to Supreme Court Rule 37.3(a), counsel of record states that the parties have consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part, and no person or entity, other than the amicus curiae, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

the principles of limited government, economic freedom and individual responsibility. The integrated mission of the Scharf-Norton Center for Constitutional Litigation is to preserve individual liberty by enforcing the features of our state and federal constitutions that directly and structurally protect individual rights, including the bill of rights, the doctrine of separation of powers and federalism. To ensure its independence, the Goldwater Institute Scharf-Norton Center for Constitutional Litigation neither seeks nor accepts government funds, and no single contributor has provided more than five percent of its annual revenue on an ongoing basis. The Goldwater Institute Scharf-Norton Center for Constitutional Litigation regards property rights as the foundation of individual liberty. Civil forfeiture laws often violate property rights by denying citizens the most basic protections of due process. This case is an important opportunity for the Court to bolster the rule of law and property rights by underscoring the Constitution's guarantee of a timely opportunity to be heard after the deprivation of one's rights.

Reason Foundation is a national, nonpartisan and nonprofit public policy think tank founded in 1978. Reason's mission is to promote liberty by developing, applying and communicating libertarian principles and policies, including free markets, individual liberty and the rule of law. Reason promotes policies that allow and encourage individuals and voluntary institutions to flourish. Reason advances its mission by publishing *Reason Magazine*, as well as commentary on its websites, www.reason.com and

www.reason.tv, and by issuing policy research reports that promote choice, competition and a dynamic market economy as the foundation for human dignity and progress. Reason selectively participates as amicus curiae in cases raising significant constitutional issues, to further Reason's avowed purpose to advance "Free Minds and Free Markets." This case is important because it addresses the need for robust due process protections to avoid capricious deprivations of property rights that undermine the rule of law.

STATEMENT OF THE CASE

1. This case involves a factual challenge to provisions of Illinois' Drug Asset Forfeiture Procedure Act (Illinois DAFPA), 725 Ill. Comp. Stat. Ann. 150/1 *et seq.* (West 2008). Under Illinois law, illegal drugs, property used to carry out or facilitate drug crimes, and the proceeds of drug crimes are all subject to civil forfeiture. *E.g.*, 720 Ill. Comp. Stat. Ann. 570/505(a) (West Supp. 2009). The Illinois DAFPA sets out procedures for effecting that forfeiture.

Certain categories of personal property – conveyances of any value and other personality worth $20,000 or less – may be forfeited through a non-judicial, administrative procedure if no one with a property interest demands a judicial proceeding. See 725 Ill. Comp. Stat. Ann. 150/6. Under that non-judicial procedure, the seizing agency has 52 days from the date of seizure to notify the State's Attorney

of the seizure "and the facts and circumstances giving rise to the seizure." *Id.* 150/5. Within 45 days after the State's Attorney is notified by the seizing agency that a property has been seized, she provides notice to "all known interest holders of the property." *Id.* 150/6(A). Interest holders then have 45 additional days to demand a judicial forfeiture proceeding, which they can trigger by filing a claim and cost bond with the State's Attorney.[2] If a claim is filed, the State's Attorney must either initiate a judicial forfeiture proceeding within 45 days or return the property. *Id.* 150/6(C), 150/9(A). If no claim is filed, the property is forfeited. *Id.* 150/6(D).

Absent "good cause," a civil judicial forfeiture proceeding is to be heard within 60 days after the claimant answers the complaint. 725 Ill. Comp. Stat. Ann. 150/9(F). The court may stay the civil forfeiture proceeding, however, if a "related" criminal prosecution is pending in a trial court. *Id.* 150/9(J).

2. Respondents brought this action under 42 U.S.C. § 1983 against petitioner's predecessor as

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[2] The cost bond is a cashier's check payable to the clerk of the court "in the sum of 10 percent of the reasonable value of the property as alleged by the State's Attorney or the sum of $100, whichever is greater, upon condition that, in case of forfeiture, the claimant must pay all costs and expenses of forfeiture proceedings." *Id.* 150/6(C)(2). "If none of the seized property is forfeited in the judicial in rem proceeding, the clerk of the court shall return to the claimant, unless the court orders otherwise, 90% of the sum which has been deposited and shall retain as costs 10% of the money deposited." *Id.* 150/6(C)(3).

State's Attorney for Cook County; the City of Chicago; and the Superintendent of the Chicago Police Department. Respondents have all had property seized without a warrant by Chicago police officers and seek to represent a class of similarly situated individuals. Their seized property included automobiles and cash. Respondents contended below that due process requires a prompt "probable cause" hearing "within ten business days of any seizure." They sought declaratory and injunctive relief. The district court rejected their claims and dismissed their case based on the authority of *Jones v. Takaki*, 38 F.3d 321 (7th Cir. 1994). Pet. App. 12a.

3. The court of appeals, applying the balancing test articulated in *Mathews v. Eldridge*, 424 U.S. 319 (1976), and *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993), concluded that "given the length of time that may result between the seizure of property and the opportunity for an owner to contest the seizure under the DAFPA, some sort of mechanism to test the validity of the retention of the property is required" by due process. *Smith v. City of Chicago*, 524 F.3d 834, 838 (7th Cir. 2008). The court remanded the case to the district court to "fashion appropriate relief consistent with this opinion." The court did provide some guidance for the district court in this regard. It instructed that

> the hearing should be prompt but need not be formal. We leave it to the district court to determine the notice requirement and what a claimant must do to activate the process. We do not envision lengthy evidentiary

> battles which would duplicate the final forfeiture hearing. The point is to protect the rights of both an innocent owner and anyone else who has been deprived of property and, in the case of an automobile or personal property other than cash, to see whether a bond or an order can be fashioned to allow the legitimate use of the property while the forfeiture proceeding is pending.

524 F.3d at 838-39.

SUMMARY OF ARGUMENT

1. DAFPA, like many state forfeiture statutes, provides powerful, dangerous, and unconstitutional financial incentives for law enforcement agencies and prosecutors offices to overreach. When the police department and the district attorney's office derive a significant part of their funds from forfeitures, the invitation to overreach is overwhelming. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 250 (1980) (unconstitutional prosecutorial bias exists if there is "a realistic possibility that the [prosecutor's] judgment will be distorted by the prospect of institutional gain as a result of zealous enforcement efforts."). Where law enforcement agencies have such a direct and powerful pecuniary incentive to seize more than the law permits, it makes sense to impose more procedural safeguards to prevent abuse and protect private property rights.

Moreover, DAFPA is stacked in favor of the State's law enforcement agencies and is bereft of

substantive and procedural protections for the innocent property owner. The Illinois statute contrasts with the federal Civil Asset Forfeiture Reform Act of 2000 (CAFRA), which carefully balances the needs of law enforcement with layers of protections for property rights. The Court should consider the due process question presented in light of this background. The Court should hold that the widely used three-part due process analysis set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976) is the appropriate test to apply in determining whether an opportunity for some sort of prompt post-seizure hearing is necessary under the DAFPA to satisfy due process.

At the time it was handed down by this Court in 1983, the decision in *$8,850* was an important advance in providing some protection against unjustifiable pre-filing delay by the government. However, the fact-specific test borrowed by the Court from *Barker v. Wingo,* 407 U.S. 514 (1972), proved to be nearly impossible for a claimant to satisfy, at least as the four-factor test was applied by the lower courts.

Indeed, the best evidence that *$8,850's* laborious fact-specific test was not an effective cure for the problem of pre-filing delay is the enactment of the CAFRA. Despite *$8,850*, pre-filing delay remained a chronic problem in federal civil forfeiture cases. One of the most important reforms in the CAFRA was the fixing of firm time limits for the government to notify the property owner of the seizure and his right to contest the forfeiture, 18 U.S.C. § 983(a)(1), and, if an

administrative claim is filed, for filing a complaint in the federal district court.

In any event, petitioner and the United States err in arguing that this case is about pre-filing delay. That is a separate issue addressed by *$8,850*. The court of appeals, relying heavily on Judge Sotomayor's opinion for the court in *Krimstock v. Kelly,* 306 F.3d 40 (2d Cir. 2002), correctly distinguished *$8,850* as dealing with "the speed with which the civil forfeiture proceeding itself is begun – a different question from whether there should be some mechanism to promptly test the validity of the seizure." 524 F.3d at 837.

Furthermore, the hearing contemplated by the court of appeals, like the hearing fashioned in the *Krimstock* litigation, also provides an owner with an opportunity to argue for the interim release of his property on hardship grounds or to offer a bond for its release – important protections that don't go to the merits or to the question of probable cause to seize. *Krimstock*, 306 F.3d at 68. For all these reasons, *Mathews* is the appropriate test.

2. The *Krimstock* hearing has proven to be an effective and not overly burdensome solution to the problem of undue government delay in providing notice and a meaningful, timely opportunity to contest the seizure and/or seek the release of the property *pendente lite.* Faced with a *Krimstock* hearing, the New York Police Department has been forced to quickly consider whether it really wishes to

forfeit, or retain pending further proceedings, the automobile it has seized. This has led to early, sensible settlement of a great many cases in the days and weeks leading up to a scheduled *Krimstock* hearing. If there is no possibility of an early hearing, the police will naturally not be inclined to investigate the facts or speak with the car owner until after the judicial forfeiture process commences.

This encouragement of early settlements is probably the best result of the *Krimstock* process. These early settlements have served the interest of New York City as well as the vehicle owners. They avoid the economic loss resulting from prolonged detention of seized vehicles, wasting assets with high storage costs relative to their value. They avoid the cost of unnecessary litigation. They encourage the police to quickly separate the cases involving real criminals and dangerous drivers, who present "a heightened risk to public safety" from those involving first time drunk driving offenders who were not seriously over the legal blood alcohol content limit. And experience has shown that they accomplish all this without placing an undue burden on the NYPD.

3. Because federal civil forfeitures typically are far more complex factually and legally than forfeitures under DAFPA and involve property of far greater value, police and prosecutors in Illinois need much less time to investigate a case and file a civil forfeiture suit than their federal counterparts. The DAFPA provision at issue in this case is limited to vehicles (of any value) and to other personal property

worth less than $20,000. By contrast, the value of the property involved in a federal civil forfeiture case can run into the hundreds of millions of dollars. Thus, petitioner's (Br. 65-66) and the United States' (Br. 20) comparison of the time limits found in the federal CAFRA with those in the Illinois state DAFPA is an exercise in comparing apples and oranges. Although the government has "an interest in a rule that allows [it] some time to investigate the situation in order to determine whether the facts entitle the Government to forfeiture," *$8,850*, 461 U.S. at 565-66, Illinois police and prosecutors do not need nearly as much time as the DAFPA allows them to make this determination because of the simplicity of the factual and legal questions presented by DAFPA cases.

A more significant comparison of the time limits under DAFPA with those in other similar state forfeiture statutes shows that the DAFPA time limits are unreasonably long, contrary to the position of petitioner and the United States. The Court should review the survey of other states' forfeiture laws attached as Table A to the Brief of the States of Illinois, Alabama, Arizona, et al. as Amici Curiae In Support of Petitioner. It demonstrates that the DAFPA's time limits are among the most generous to the state of any forfeiture statute in the country. Moreover, the DAFPA falls short in many other respects as it contains almost no procedural protections or other safeguards for the property owner.

ARGUMENT

I. THIS COURT'S REMEDY IN *$8,850* HAS NOT PREVENTED UNDUE GOVERNMENT DELAY IN FILING CIVIL FORFEITURE PROCEEDINGS AND, IN ANY EVENT, ADDRESSES A DIFFERENT QUESTION FROM WHETHER THERE SHOULD BE A MECHANISM TO PROMPTLY TEST THE VALIDITY OF SEIZURE AND OBTAIN INTERIM RELEASE OF PROPERTY.

DAFPA, like many state forfeiture statutes, provides powerful, dangerous, and unconstitutional financial incentives for law enforcement agencies and prosecutors offices to overreach. When the police department and the district attorney's office derive a significant part of their funds from forfeitures, the invitation to overreach is overwhelming. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 250 (1980) (unconstitutional prosecutorial bias exists if there is "a realistic possibility that the [prosecutor's] judgment will be distorted by the prospect of institutional gain as a result of zealous enforcement efforts."). Where law enforcement agencies have such a direct and powerful pecuniary incentive to seize more than the law permits, it makes sense to impose more procedural safeguards to prevent abuse and protect private property rights. *United States v. James Daniel Good Real Property*, 510 U.S. 43, 55-56, 114 S. Ct. 492, 502 (1993) (relying on fact that law enforcement now has "a direct pecuniary interest in the outcome of the proceeding"; quoting shocking

1990 memo in which the Attorney General urged U.S. Attorneys to increase the volume of forfeitures to meet the Department of Justice's annual budget target).

Moreover, DAFPA is stacked in favor of the State's law enforcement agencies and is bereft of substantive and procedural protections for the innocent property owner, as we explain below. The Illinois statute contrasts with the federal Civil Asset Forfeiture Reform Act of 2000 (CAFRA), which carefully balances the needs of law enforcement with layers of protections for property rights. The Court should consider the due process question presented in light of this background. The Court should hold that the widely used three-part due process analysis set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976) is the appropriate test to apply in determining whether an opportunity for some sort of prompt post-seizure hearing is necessary under the DAFPA to satisfy due process.

At the time it was handed down by this Court in 1983, the decision in *$8,850* was an important advance in providing some protection against unjustifiable pre-filing delay by the government. However, the fact-specific test borrowed by the Court from *Barker v. Wingo,* 407 U.S. 514 (1972), proved to be nearly impossible for a claimant to satisfy, at least as the four-factor test was applied by the lower courts. The proof is in the pudding. There are few reported decisions in which a claimant prevailed on a due process delay claim under *$8,850*. The lower

courts were reluctant to find that the four-part test was satisfied because the remedy of dismissal with prejudice was viewed as too drastic a sanction for the government's lassitude or neglect. Moreover, courts did not wish to find fault with "their" local AUSA's handling of the case.

Indeed, the best evidence that *$8,850's* laborious fact-specific test was not an effective cure for the problem of pre-filing delay is the enactment of the CAFRA. Despite *$8,850*, pre-filing delay remained a chronic problem in federal civil forfeiture cases. One of the most important reforms in the CAFRA was the fixing of firm time limits for the government to notify the property owner of the seizure and his right to contest the forfeiture, 18 U.S.C. § 983(a)(1), and, if an administrative claim is filed, for filing a complaint in the federal district court. If the government fails to file the complaint within the time fixed by the statute, or obtain an extension of the filing deadline "for good cause shown" or obtain a criminal indictment containing an allegation that the property is subject to forfeiture, it must return the property and "may not take any further action to effect the civil forfeiture of such property in connection with the underlying offense." 18 U.S.C. § 983(a)(3)(B). Following the enactment of the CAFRA, the pre-filing delay remedy provided by *$8,850* became largely superfluous in federal civil forfeiture cases. Because nearly all of the more important state forfeiture statutes contain fixed time limits for filing the forfeiture case, *$8,850* has played an insignificant role in protecting

property owners from undue filing delay in state forfeiture proceedings.

In any event, petitioner and the United States err in arguing that this case is about pre-filing delay. That is a separate issue addressed by *$8,850*. The court of appeals, relying heavily on Judge Sotomayor's opinion for the court in *Krimstock v. Kelly*, 306 F.3d 40 (2d Cir. 2002), correctly distinguished *$8,850* as dealing with "the speed with which the civil forfeiture proceeding itself is begun – a different question from whether there should be some mechanism to promptly test the validity of the seizure." 524 F.3d at 837. This case is about whether respondents are entitled to a prompt post-seizure hearing as to the existence of probable cause at or about the time of seizure.[3] That issue is not the same as the one presented at the forfeiture hearing. Then, the issue is whether the state has sufficient evidence *at the time of the forfeiture hearing* to show that the property is subject to forfeiture. *See Krimstock v. Kelly*, 306 F.3d at 49-50; 1 David B. Smith, *Prosecution and Defense of Forfeiture Cases*, ¶10.05A, 10-89 (Dec. 2008 ed.).

Furthermore, the hearing contemplated by the court of appeals, like the hearing fashioned in the

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[3] It is significant that all of the property seized in this case was seized from respondents without a warrant and that there was no *ex parte* review of the seizure by a court after the seizure. *Compare* Alaska Stat. § 17.30.114, 17.30.116 (requiring *ex parte* probable cause determination within 48 hours of seizure for civil forfeiture).

Krimstock litigation, also provides an owner with an opportunity to argue for the interim release of his property on hardship grounds or to offer a bond for its release – important protections that don't go to the merits or to the question of probable cause to seize. *Krimstock*, 306 F.3d at 68. For all these reasons, *Mathews* is the appropriate test. And, for the reasons stated in respondents' brief and by their other amici, the court of appeals properly applied the *Mathews* test in this case, reaching the same result as the Second Circuit in *Krimstock*.[4]

II. THE *KRIMSTOCK* HEARING HAS PROVEN TO BE AN EFFECTIVE AND NOT OVERLY BURDENSOME MEANS OF PREVENTING GOVERNMENT DELAY IN PROVIDING NOTICE AND A MEANINGFUL, TIMELY OPPORTUNITY TO CONTEST SEIZURE AND/OR SEEK RELEASE OF PROPERTY *PENDENTE LITE*.

Petitioner and her amici contend that the preliminary hearing contemplated by the court of

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[4] Even if characterized as a mandatory injunction, the relief granted by the Seventh Circuit was justified because "the facts and the law clearly favored" respondents. *Martinez v. Mathews*, 544 F.2d 1233, 1243 (5th Cir. 1976). Further litigation over additional responsive pleadings or discovery would have been futile to overcome the court of appeals' ruling that *Mathews* controls this case. *Cf. Film TecCorp v. Hyranautics*, 67 F.3d 931, 939 (Fed. Cir. 1995) (affirming refusal to allow filing of additional responsive pleading because doing so would be futile).

appeals would unduly burden law enforcement. However, they do not provide this Court with any reason to believe that such hearings are particularly burdensome. One wonders why they do not discuss the actual workings of the *Krimstock* hearing in New York City since that would presumably provide the best evidence that such hearings are burdensome to law enforcement. As it happens, there is an excellent study of the actual way that *Krimstock* hearings work in practice, written by two attorneys who participated in a Latham & Watkins *pro bono* program that provides legal representation for indigent claimants in *Krimstock* cases. Since the program's inception, Latham lawyers have represented more than a hundred *Krimstock* clients, thus providing a substantial basis for evaluating the *Krimstock* hearing in practice. Gregory L. Acquaviva & Kevin M. McDonough, *How to Win a Krimstock Hearing: Litigating Vehicle Retention Proceedings Before New York's Office of Administrative Trials and Hearings*, 18 Widener L.J. 23 (2008).

Faced with a *Krimstock* hearing, the New York Police Department has been forced to quickly consider whether it really wishes to forfeit, or retain pending further proceedings, the automobile it has seized. This has led to early, sensible settlement of a great many cases in the days and weeks leading up to a scheduled *Krimstock* hearing. If there is no possibility of an early hearing, the police will naturally not be inclined to investigate the facts or speak with the car owner until after the judicial

forfeiture process commences. *See* 18 Widener L.J. 23, 85 & n.377-80. On the day of the *Krimstock* hearing, a judge conducts a settlement conference with the parties if they have not already settled the case. *Id.*, at 81. This encouragement of early settlements is probably the best result of the *Krimstock* process. These early settlements have served the interest of the City as well as the vehicle owners. They avoid the economic loss resulting from prolonged detention of seized vehicles, wasting assets with high storage costs relative to their value. They encourage the police to quickly separate the cases involving real criminals and dangerous drivers, who present "a heightened risk to public safety," *id.* at 63, from those involving first time drunk driving offenders who were not seriously over the limit. If an early settlement is not reached, the same types of considerations inform the decision of the City's Office of Administrative Trials and Hearings ("OATH") court on whether to release the vehicle to its owner *pendente lite*. *Id.*, at 53-80.

The *Krimstock* hearing is not limited to the question of whether the police had probable cause for the seizure. Rather, it requires the police department to prove that it is likely to prevail at the forfeiture hearing by a preponderance of the evidence *and* that returning the vehicle to the claimant prior to the forfeiture hearing presents a heightened risk to

public safety.[5] The "public safety" factor involves consideration of the owner's alleged offense, prior record and background. The *Krimstock* process also allows the claimant to present an affirmative "innocent owner" defense and to show why continued impoundment would substantially interfere with his "'ability to obtain critical life necessities such as earning a livelihood, obtaining an education, or receiving necessary medical care.'" *Id.*, at 79-80, quoting *Property Clerk v. Harris*, 878 N.E. 2d 1004, 1012 (N.Y. 2007). For these reasons, the hearing is more complicated than the one that the Seventh Circuit seems to contemplate in its decision. Despite that additional complexity, the *Krimstock* hearing does not appear to be overly burdensome for the police department. The time it takes is more than outweighed by the benefits it confers on both the owner and the police department.

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[5] This requirement was not imposed by Chief Judge Mukasey's decision, but rather by an OATH court. *Id.*, at 62-63. Under Judge Mukasey's decision, the police department only had to prove that retention of the vehicle is necessary to ensure its availability in forfeiture proceedings. *Krimstock v. Kelly*, 2005 U.S. Dist. LEXIS 43845, at *4 (S.D. N.Y. Nov. 29, 2005). Interestingly, New York's highest court has noted the City's ability to preserve the value of seized assets through less restrictive means than continued retention. *Property Clerk v. Harris*, 878 N.E.2d 1004, 1011 (N.Y. 2007) (City may protect its interest in forfeitable property by securing a bond or seeking a restraining order prohibiting sale of property); *County of Nassau v. Canavan*, 802 N.E.2d 616, 625 (N.Y. 2003) (same as to Nassau County). The CAFRA authorizes courts to issue restraining orders for the same purpose. 18 U.S.C. § 983(j).

"The *Krimstock* hearing is an expedited proceeding featuring brief opening statements, witness examination, and closing arguments." *Id.*, at 81-82. After opening statements, the police department presents its case-in-chief.

> More often than not, the Police Department will open its case by offering into evidence several exhibits, including the arrest report and criminal complaint report. Due to the liberal evidence rules that govern OATH proceedings – the OATH rules do not require compliance with 'technical rules of evidence, including hearsay rules,' – the Police Department's exhibits are generally admitted into evidence without issue. Indeed, counsel seldom objects during the introduction of evidence and the examination of witnesses . . . Once the exhibits have been admitted, the Police Department typically takes testimony from the claimant, if the claimant is available. The claimant is often the only witness who will testify during the hearing.

Id. "After all of the evidence has been presented and the record is closed, the judge renders a written decision, usually within three business days of the hearing." *Id.*, at 84.

One of the many bogeyman arguments raised by the Solicitor General is that if the court of appeals' remedy turns out to require a probable cause hearing after every seizure, it would "burden the judicial system with hearings even in uncontested cases." Br. 25. This concern is groundless because there is no

reason to require such a hearing if the owner does not wish to contest the forfeiture of his property. A *Krimstock* hearing is only provided when a person with standing to contest the forfeiture requests such a hearing and only one person may appear as the claimant at the hearing. Preference is given to the registered owner. *Id.*, at 72.

The Solicitor General also argues (Br. 25) that a preliminary hearing that involves claimant's assertion of an innocent owner defense would create tension with the claimant's right against compelled self-incrimination in any related criminal case. While the government's concern about the claimant's Fifth Amendment right is touching, it overlooks the fact that a claimant, not the state, is in the best position to decide whether it is in his interest to testify at the preliminary hearing or not. A putative innocent owner is not normally in any danger of being charged criminally. This is not really a Fifth Amendment privilege question at all.

The Solicitor General's concern (Br. 24) about pretrial exposure of its own related criminal case or investigation at an early hearing is also a make-weight. The trial judge can deal with this problem, if it arises, through a stay of the civil forfeiture proceeding or by allowing the state to make *ex parte* submissions under seal. Moreover, the police should have no problem demonstrating probable cause for the seizure since the Fourth Amendment requires them to have such evidence prior to seizing the property.

III. PETITIONER'S COMPARISON OF THE TIME LIMITS IN THE FEDERAL CAFRA TO THOSE IN ILLINOIS' DAFPA IS A MISLEADING EXERCISE THAT COMPARES APPLES AND ORANGES.

1. Because federal civil forfeitures typically are far more complex factually and legally than forfeitures under DAFPA and involve property of far greater value than under DAFPA, police and prosecutors in Illinois need much less time to investigate a case and file a civil forfeiture suit. The DAFPA provision at issue in this case is explicitly limited to vehicles and to other personal property worth less than $20,000. By contrast, the value of the property involved in a federal civil forfeiture case can run into the hundreds of millions of dollars. *E.g., United States v. All Assets Held at Bank Julius Baer & Co.*, 571 F. Supp. 2d 1 (D.D.C. 2008) (also illustrating how complex the factual and legal issues may be in federal cases). Thus, petitioner's (Br. 65-66) and the United States' (Br. 20) comparison of the time limits found in the federal CAFRA with those in the Illinois state DAFPA is an exercise in comparing apples and oranges. Although the government has "an interest in a rule that allows [it] some time to investigate the situation in order to determine whether the facts entitle the Government to forfeiture," *$8,850*, 461 U.S. at 565-66, Illinois police and prosecutors do not need nearly as much time as the DAFPA allows them to make this determination because of the simplicity

of the factual and legal questions presented by DAFPA cases.

2. A more significant comparison of the time limits under DAFPA with those in other similar state forfeiture statutes shows that the DAFPA time limits are unreasonably lengthy, contrary to the position of petitioner and the United States. The Court should review the survey of other states' forfeiture laws attached as Table A to the Brief of the States of Illinois, Alabama, Arizona, et al. as Amici Curiae In Support of Petitioner. It demonstrates that the DAFPA's time limits are among the most generous to the state of any forfeiture statute in the country. As explained below, the DAFPA falls short in many other respects as it contains almost no procedural protections or other safeguards for the property owner.[6]

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[6] One of the most obnoxious provisions in the DAFPA is the requirement that a property owner post a cost bond (a cashier's check to compensate the State's Attorney for her litigation costs in a contested case) simply to obtain the right to contest the forfeiture of his property. Even if the owner completely prevails, DAFPA dictates that the clerk of the court retain ten percent of the bond! If the state prevails with respect to *any part* of the seized property, the claimant loses the entire cost bond. 725 ILCS 150/6(C)(3). The requirement of a cost bond obviously deters owners from seeking the return of their property. A prevailing claimant is not entitled to attorney's fees, costs or interest on any seized money. By contrast, the CAFRA provides that in any civil forfeiture proceeding in which the claimant "substantially prevails, the United States shall be liable for – (A) reasonable attorney fees and other litigation costs reasonably

(Continued on following page)

For example, in Florida, the government must provide notice within five business days of seizure and a preliminary hearing must be held within ten days after a request for such a hearing is received. The notice must state that a person entitled to receive notice may request an adversarial preliminary hearing. Fla. Stat. Ann. § 932.703(2)(a). Moreover, unlike the DAFPA, the Florida statute is not limited to personal property with a value of less than $20,000. It reaches every manner of property, real and personal, regardless of its value. Unlike the DAFPA, the Florida Contraband Forfeiture Act is not limited to drug offenses; rather, it reaches all felonies. If Florida can provide such speedy notice and an opportunity for a preliminary adversarial hearing in all felony cases without unduly burdening law enforcement, why does Illinois need so much more time to provide notice and an opportunity to be heard in much simpler cases? The Florida statute also provides far more procedural protections than the DAFPA and the state must prove its case by clear and

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incurred by the claimant; (B) post-judgment interest, as set forth in section 1961 of this title; and (C) . . . (i) interest actually paid to the United States from the date of seizure . . . and (ii) an imputed amount of interest that such currency, instruments, or proceeds would have earned at the rate applicable to the 30-day Treasury Bill, for any period during which no interest was paid . . . " 28 U.S.C. § 2465(b)(1). Another provision of the CAFRA amended the Federal Tort Claims Act, 28 U.S.C. § 2680(c), to make the United States liable for damages caused to the property while in government custody if the claimant prevails. There is no such liability for damages under the DAFPA.

convincing evidence, a much higher burden than mere "probable cause," which may be shown through rank hearsay evidence. Fla. Stat. Ann. § 932.704(8). *See generally,* 2 David B. Smith, *Prosecution and Defense of Forfeiture Cases,* Ch. 17 (Dec. 2008 ed.) (discussing Florida Contraband Forfeiture Act).

Arizona, a state with a history of aggressively pursuing forfeiture of assets, sometimes of high value, has a statute that allows a court to hold a hearing on probable cause within only *five* business days of the seizure, if there has been no prior judicial determination of probable cause. Ariz. Rev. Stat. § 13-4310. In the case at bar there were no prior judicial determinations of probable cause with respect to any of the respondents' property.[7]

In Missouri, the government has a mere fourteen days after seizure within which to file a forfeiture case in court and the claimant can file a motion to dismiss that must be ruled on within ten days. Mo. Rev. Stat. §§ 513.607.6(2), 513.612. Even Texas, a state known for its "tough on crime" policies, requires the prosecutor to institute forfeiture proceedings in

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[7] Thus, the Seventh Circuit, like the *Krimstock* court, was fully justified in relying on the Florida and Arizona statutes to illustrate that "some states have procedures which provide an early opportunity to challenge the retention of seized property." *Smith v. City of Chicago*, 524 F.3d 834, 838 (7th Cir. 2008). Moreover, these other state statutes also demonstrate that it is not unduly burdensome to hold an adversarial preliminary hearing within a short time of the seizure.

court within thirty days of seizure. Tex. Code Crim. Proc. Art. 59.04(a). This requirement has not deterred some of the most aggressive local forfeiture agencies in the country.[8]

Significantly, Illinois itself requires preliminary hearings in a wide variety of related forfeiture schemes, even though under those statutes the value of the property may be much greater and the cases more complex than under the DAFPA. *See* Amicus Brief of the Women's Criminal Defense Bar Association in Support of Respondents.

3. Petitioner's and the United States' comparison of the DAFPA with the CAFRA is also misleading because the property owner and persons with an interest in the property have various avenues to obtain an early adversarial hearing or hardship or bond release under the CAFRA and other federal law, notably Rule 41(g), whereas the DAFPA affords no similar opportunities for obtaining an early hearing or other mechanism by which the release of the property *pendente lite* may be had.

This Court's decision in *$8,850* explains that a property owner in a federal civil forfeiture case has "multiple ways of compelling the forfeiture process to

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[8] *See "Property Seizures Seen As Piracy,"* San Antonio Express-News, Feb. 7, 2009; *"Texas town stops black motorists, seizes assets,"* Chicago Tribune, Mar. 13, 2009 (reporting on horrific forfeiture scandal in Tenaja, Texas reminiscent of similar local forfeiture scandals in the 1990's).

move forward," in the words of the Solicitor General (Br. 16). These include "filing an equitable action seeking an order compelling commencement of a civil judicial action or return of the property; . . . and filing a motion under then-Rule 41(e) of the Federal Rules of Criminal Procedure – now Rule 41(g) – challenging the validity of the seizure and seeking return of the property."[9] *Ibid.*

Petitioner claims (Br. 46) that Illinois law allows property owners to petition a court for the return of personal property they contend the government wrongfully seized. This remedy would supposedly avoid the up to 187 day pre-filing delay that the Seventh Circuit found intolerable. Respondents contend that such a remedy is not available under Illinois law. The record does not demonstrate who is right. However, it should be noted that *Krimstock*

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[9] Rule 41(g) is not simply a device for pressing the government to file a forfeiture complaint. It allows an owner faced with irreparable injury from the government's continued retention of property seized without probable cause to obtain an extremely prompt hearing on the merits of the government's case. It is widely used in cases where entire businesses or perishable goods such as fish are seized for forfeiture. *United States v. Sims*, 376 F.3d 705, 708 (7th Cir. 2004); *Mr. Lucky Messenger Service v. United States*, 587 F.2d 15, 18 (8th Cir 1978). A claimant can obtain the same relief by moving for a preliminary injunction against the government under Rule 65. *E.g., Delaware Valley Fish Co. v. Fish and Wildlife Service*, 2009 U.S. Dist. LEXIS 51089, *10-12 (D. Me. June 12, 2009) (recommending that court grant preliminary injunction ordering FWS to release plaintiff's truck used to transport live baby eels).

ruled that an owner's ability to bring suit to force the City to justify its retention of the property is not an adequate substitute for a right to an early probable cause hearing because it places the onus on each claimant to file and pursue a separate civil action and each claimant would bear the burden of showing a clear legal right under state law to release of their vehicles. 306 F.3d at 59-60.[10] Thus, even if such a remedy is available under Illinois law, it is inadequate. The Rule 41(g) remedy under federal law, by contrast, does not require the owner to file a separate lawsuit against the government with all the expense and built in delay that entails. A simple motion is enough to obtain the desired result.[11]

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[10] In low value cases such as those brought under the DAFPA, a high percentage of claimants appear *pro se* because counsel is prohibitively expensive. The type of informal post-seizure hearing contemplated by the court of appeals would greatly benefit *pro se* claimants. Even assuming that Illinois law permits the filing of a suit for the return of property, the typical *pro se* owner is not capable of making use of such a remedy. For that matter, a *pro se* claimant is not capable of arguing a motion under *$8,850* either. Indeed, given the low value of the property, the sort of lawyer an owner is likely to be able to retain may not have the time and ability to brief an *$8,850* issue.

[11] Another important difference between Illinois and federal law is that in federal civil forfeiture cases the property is almost always seized pursuant to a warrant obtained by demonstrating probable cause to a district court judge or magistrate judge. In this case, by contrast, all of the property was seized without warrants. It makes sense to require an early probable cause hearing where the police have seized property without a warrant.

Another major difference between the CAFRA and the DAFPA involves the availability of procedures to obtain the release of the property based on substantial hardship or in exchange for a 100% bond. As the Seventh Circuit observed, 524 F.3d at 838, it is difficult to understand what interest the state has in retaining possession of the typical seized car when the property owner is willing to post the cash value of the car, as appraised by the State's Attorney, in exchange for the release of the vehicle *pendente lite* or as a substitute *res*.[12] The posting of the 100% bond relieves the state of the cost and burden of storing the vehicle and avoids the economic loss inherent in prolonging its seizure for months or years. 19 U.S.C. § 1614 is the customs law provision authorizing the release of seized property by the government when the owner "offers to pay" the appraised value of the property. The court would not become involved in this procedure unless the government unreasonably refuses to release the property upon payment of its full value.[13] Section 1614 is now complimented by Rule G(7)(b)(v), which

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[12] If the vehicle is specially fitted out for drug smuggling or the like, that would, of course, justify the state's continued retention of the vehicle. But such instances are uncommon. *See United States v. One Solid Gold Object In Form of a Rooster*, 186 F. Supp. 526, 527 (D. Nev. 1960) ("For the Government to refuse a bond in the amount of the actual value of an automobile would be without basis in reason or logic.").

[13] The absence of federal case law on this point shows that the seizing agencies rarely deny release of seized property when the owner offers to post the full appraised value of the property.

provides that the court "may order that the property be delivered to the claimant pending the conclusion of the action if the claimant shows circumstances that would permit [interlocutory] sale under Rule G(7)(b)(i) and gives security under these rules."

Because many owners are not financially able to deposit the full value of a seized vehicle, the hardship release provision of the CAFRA fills an important role in mitigating the harshness of civil forfeiture. Under 18 U.S.C. § 983(f)(1) a claimant "is entitled to the immediate release of seized property" if the statutory requirements for hardship release are met. The hardship must be "substantial" and "outweigh[ ] the risk that the property will be destroyed, lost, concealed, or transferred if it is returned to the claimant during the pendency of the proceedings." § 983(f)(1)(D). A hardship petition may be filed at any time; a property owner need not wait for the judicial action to commence. § 983(f)(3). Vehicles necessary for making a living have been released under the hardship provision. *E.g., United States v. $1,231,349.68 in Funds*, 227 F. Supp. 2d 125 (D.D.C. 2002).

The availability of a procedure for obtaining interim relief on grounds of hardship, or release on bond, are other considerations under the *Mathews* balancing test going to the importance of the affected private interest. *Krimstock*, 306 F.3d at 61-62. Accordingly, the differences between the CAFRA and the DAFPA – which has no hardship relief or bond release provision – should not be minimized.

DAFPA's unduly long period of time for notice and an opportunity to be heard is of a piece with the rest of the statute's provisions, which are singularly lacking in safeguards for the property owner's rights.[14] CAFRA, by contrast, is loaded with important procedural and substantive protections for the property owner. We have already noted that the CAFRA awards attorney fees, costs and interest to claimants who "substantially prevail" against the government, and allows suits for damage to seized property against the sovereign as well. The DAFPA provides none of these remedies and even mulcts a *prevailing* claimant for 10 percent of the required cost bond. Another significant difference is that the CAFRA provides authority for the court to appoint counsel for indigent claimants under certain circumstances. 18 U.S.C. § 983(b). DAFPA does not. Far from helping the owner to obtain representation, it makes the owner's lot more difficult by needlessly requiring the posting of a cost bond.

One of the most important differences between the two statutes is the government's burden of proof.

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[14] "It is the aggregate effect of forfeiture proceedings – summary seizures, minimalist government justification, shifting of burdens, unreasonable time limits for contesting forfeitures, generous time limits for prosecuting them, readily invoked default rules, and bond posting requirements – which combine to make the process unfair." Professor Mary M. Cheh, *Can Something This Easy, Quick and Profitable Also Be Fair? Runaway Civil Forfeiture Stumbles on the Constitution*, 39 N.Y.L. Sch. L. Rev. 1, 45-46 (1994).

Under the CAFRA, the government's burden of proof is the normal civil standard of preponderance of the evidence. 18 U.S.C. § 983(c)(1). (Several state civil forfeiture schemes require the state to prove its case by clear and convincing evidence or even beyond a reasonable doubt.)[15] The DAFPA only requires the state to show that there is probable cause to believe that the property is subject to forfeiture. 725 ILCS 150/9(G). This merely requires the state to show, through otherwise inadmissible hearsay evidence, "reasonable grounds for the belief that there exists a nexus between the property and illegal drug activity, supported by less than *prima facie* proof but more than mere suspicion." *People v. 1945 N. 31st St.*, 841 N.E.2d 928, 942 (Ill. 2005). It "requires only a probability or substantial chance of the nexus and not an actual showing." *Ibid.* Although the state is allowed to satisfy this ridiculously low burden with rank hearsay, the claimant's affirmative "innocent owner" defense must be proven by a preponderance of the evidence and the rules of evidence apply to *his* showing. 725 ILCS 150/9(B), (G).

Prior to the enactment of the CAFRA, the federal government's burden of proof was also merely to show

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[15] Chairman Henry J. Hyde's civil forfeiture reform bill, H.R. 1658, which became the CAFRA after numerous changes in the Senate, was approved by the House on June 24, 1999, on a vote of 375 to 48. Hyde's bill would have raised the government's burden of proof to *clear and convincing* evidence and was vehemently opposed by the DoJ and its law enforcement allies.

probable cause through otherwise inadmissible hearsay evidence.[16] 19 U.S.C. § 1615. This was the most criticized feature of pre-CAFRA federal civil forfeiture law and several federal courts had opined that the probable cause burden violated due process.[17] Congressmen and senators who lead the forfeiture reform effort were incredulous that the probable cause burden could be constitutional.

4. Finally, we would reiterate what we stressed at the beginning of this brief: that DAFPA, provides

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[16] Significantly, even before the enactment of the CAFRA, the vast majority of state civil forfeiture schemes required the state to prove its case by at least a preponderance of the evidence. Thus, the DAFPA was an outlier statute even before 2000.

[17] *E.g., United States v. Real Property in Section 9, Town 29 N.*, 241 F.3d 796, 799 (6th Cir. 2001) (characterizing probable cause burden of proof under pre-CAFRA law as "an aberration" that was repeatedly criticized by courts and commentators); *United States v. $49,576.00 U.S. Currency*, 116 F.3d 425, 428-29 (9th Cir. 1997) (Kozinski, J.) ("We would find it surprising were the Constitution to permit such an important decision to turn on a meager burden of proof like probable cause."); *United States v. Leasehold Interest in 121 Nostrand Ave.*, 760 F. Supp. 1015, 1032 (E.D. N.Y. 1991) (Weinstein, J.) ("shifting of the burden of proof stacks the deck heavily in favor of the Government" and is questionable both on policy and constitutional grounds); *United States v. $12,390.00*, 956 F.2d 801, 807-11 (8th Cir. 1992) (Beam, J., dissenting in part) (Judge Beam could not "reconcile the ease with which title to property may be forfeited under [19 U.S.C. § 1615] with the due process guarantee of the Fifth Amendment." "This result clearly does not reflect the value of private property in our society, and makes the risk of an erroneous deprivation intolerable.").

powerful, dangerous, and unconstitutional financial incentives for law enforcement agencies and prosecutors offices to overreach. When the police department and the district attorney's office derive a significant part of their funds from forfeitures, the invitation to overreach is overwhelming. Such financial incentives may also seriously distort law enforcement priorities, making police more interested in seizing property than in arresting criminals. *See, e.g., United States v. James Daniel Good Real Property*, 510 U.S. 43, 55-56, 114 S. Ct. 492, 502 (1993) (emphasizing that government now "has a direct pecuniary interest" in forfeiture); *Harmelin v. Michigan*, 501 U.S. 957, 978-79 n.9 (1991) (Scalia, J., concurring) (because they increase government revenues instead of expenditures, economic sanctions are particularly subject to abuse and need to be carefully scrutinized); *United States v. Funds Held in the Name or For the Benefit of Wetterer*, 210 F.3d 96, 110 (2d Cir. 2000) ("This arrangement creates incentives that evidently require a more-than-human judgment and restraint . . . The bare financial facts of this case shine a light on the corrupting incentives of this [earmarking] arrangement: we see aggressive but marginal claims asserted on dubious jurisdiction to seize charitable funds raised for the relief of abject orphans in an impoverished country, so that the money can be diverted for expenditure by the Department of Justice."); *Krimstock*, 306 F.3d at 63 (emphasizing need for greater procedural safeguards where government has pecuniary interest in outcome of forfeiture proceedings); *United States v. Currency, In the Amount of*

$150,660.00, 980 F.2d 1200, 1208 (8th Cir. 1992) (Bright, J., dissenting) (court should not find probable cause based on opinion of police officer that seized cash smelled of marijuana when his department would receive a direct financial benefit from the forfeiture).

Joseph McNamara has written about the perverse consequences of making the police dependent on forfeiture revenues. He observes that "police organizations have become addicted to grabbing property. . . . As police chief of San Jose during the 1980's, I was one of the worst addicts." "*When Police Take Property, Who Do You Call?*," Orange County Register, June 6, 1999, at 5.[18] When he complained to the city manager that there were no funds in the budget earmarked for police equipment, the city manager replied, "You guys seized $4 million last year, I expect you to do better this year." McNamara concluded that "when cops are put under pressure to produce good statistics and revenue, bad things happen." *Id.* This topic is explored at much

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[18] While president of the National District Attorney's Association, Oklahoma County District Attorney Bob Macy blamed his office's budget shortfall on declining forfeiture revenues. Macy said the shortfall was due to local police agencies choosing to turn their forfeiture seizures over to the federal authorities so that they could get a larger share of the property than they would get in state court, where the loot had to be shared with the prosecutor's office (as in about half of the states). "*Macy Seeks Ways to Handle Budget*," The Daily Oklahoman, Jan. 1, 1993, at 19.

greater length in the Amicus Brief of the Institute for Justice in Support of Respondents. It is also examined at length in 1 David B. Smith, *Prosecution and Defense of Forfeiture Cases,* ¶1.01, 1-9 to 1-12.2, 1-26.1 to 1-33; ¶7.02[2], 7-10.1 to 7-10.4 (Dec. 2008 ed.).

While the CAFRA did much to level the playing field in federal civil forfeiture cases, it did not address state forfeiture schemes, many of which remain fundamentally unfair and subject to great abuse by self-interested law enforcement agencies "policing for profit." This Court has not chosen to review the problems inherent in many of our state forfeiture statutes and the continual abuses to which they have given rise. The DAFPA statute before the Court in this case is a prime example of an unfair state forfeiture statute. It would be a pity if the Court reverses the judgment below and thus signals to the states that it will only take an interest in what is happening in this arena of the law when the decision below attempts to strike a blow for fairness and better protection of fundamental property rights.[19] Rather, the Court should use this opportunity to encourage the states to examine whether their forfeiture laws need reform to avoid challenges to their constitutionality.

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[19] As the Court stated in *Good*, "[i]ndividual freedom finds tangible expression in property rights." 114 S. Ct. 492, 505.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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PETITIONER,

v.

CHERMANE SMITH, EDMANUEL PEREZ, TYHESHA BRUNSTON, MICHELLE WALDO, KIRK YUNKER, AND TONY WILLIAMS,

RESPONDENTS.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE STATES OF ILLINOIS, ALABAMA, ARIZONA, COLORADO, GEORGIA, HAWAII, IDAHO, INDIANA, IOWA, MASSACHUSETTS, MICHIGAN, NEVADA, OHIO, PENNSYLVANIA, SOUTH CAROLINA, TEXAS, UTAH, WASHINGTON, WISCONSIN, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

In determining whether the Due Process Clause requires a state or local government to provide a post-seizure probable cause hearing prior to a statutory judicial forfeiture proceeding and, if so, when such a hearing must take place, should district courts apply the "speedy trial test" employed in *United States v. $8,850*, 461 U.S. 555 (1983), and *Barker v. Wingo*, 407 U.S. 514 (1972), or the three-part due process analysis set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976)?

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INTEREST OF THE *AMICI CURIAE*

Most States and the federal government subject personal property used or intended for use in the commission of narcotics crimes to civil forfeiture. Such laws provide a "significant beneficial effect in deterring the rising incidence of the abuse and trafficking of [controlled] substances," and they "secure for State and local units of government some resources for deterring drug abuse and drug trafficking." 725 ILCS 150/2 (2008). The Seventh Circuit's holding below—that the warrantless seizure of personal property must be followed closely by an adversarial "probable cause to detain" hearing, in advance of the actual forfeiture proceeding—imposes massive, unnecessary costs on States seeking to achieve these aims.

Most States do not offer the interim hearing that the Seventh Circuit now demands.[1] And even those

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[1] In requiring adversarial preliminary hearings, the Seventh Circuit focused on the length of time—97 days for property worth more than $20,000 and 142 days for property worth less than $20,000, if the claimant is diligent—that may elapse under Illinois law between the seizure of property and an opportunity to seek its release. Pet. App. 3a, 10a. But the vast majority of state drug forfeiture statutes do not provide for a preliminary hearing in advance of the actual forfeiture hearing. Several States, including Colorado, Delaware, Hawaii, Maryland, and New Hampshire, allow the passage of a similar amount of time prior to an adversarial hearing; other States, such as California, Idaho, Iowa, Maine, Mississippi, Missouri, Montana, South Dakota, Utah, Vermont, and Wisconsin, provide that the adversarial hearing must occur more quickly than Illinois law requires, but likely not soon

that do generally require only a judicial determination that there is probable cause to find a nexus between the property and illegal drug activity,[2] well short of what the Seventh Circuit's new due process rule seems to anticipate.

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enough to meet the Seventh Circuit's rule; and a large number of States, including Alabama, Alaska, Arkansas, Connecticut, Indiana, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Dakota, Oklahoma, Pennsylvania, Rhode Island, Tennessee, Texas, Virginia, Washington, and Wyoming, do not provide any statutory deadline for the adversarial hearing. Moreover, while a minority of States offer some form of preliminary hearing, most of these States (Arizona, Georgia, Kansas, Louisiana, Nebraska, North Carolina, Ohio, Oregon, and South Carolina) do not provide it within ten days of the seizure, as respondents demanded, and perhaps not sufficiently quickly to satisfy the Seventh Circuit. The relevant state drug forfeiture statutes may be found in Table A, attached to this brief. Affirmance of the decision below will call into question not only these laws but also myriad other state forfeiture statues.

[2] For example, Georgia and Kansas provide for a preliminary hearing within thirty days but only if there was no prior judicial determination, even *ex parte*, of probable cause and only on the issue of probable cause, not innocent ownership. See Ga. Code Ann. § 16-13-49(q)(4) (2008); Kan. Stat. Ann. § 60-4112(c) (2008). And although cited favorably by the Seventh Circuit, Arizona limits its preliminary hearing to probable cause and does not allow adjudication of innocent ownership until the actual forfeiture proceeding. See Ariz. Rev. Stat. § 13-4310 (2009).

If affirmed by this Court, the holding below not only threatens most state forfeiture laws, but it offers no ready fix for States seeking to preserve their statutes. It is indifferent to expense or administrative burden, requiring a prompt, interim hearing in all cases and in all jurisdictions, no matter the circumstances. Equally troubling, the decision below transplants the framework of *Mathews v. Eldridge*, 424 U.S. 319 (1976), to a context where it has no place, and then applies that framework to invalidate a state law wholesale without first asking whether the law is amenable to constitutional application. These doctrinal innovations—on which the holding below depends—threaten countless state laws beyond the forfeiture context.

STATEMENT

On November 22, 2006, respondents filed a complaint against the City of Chicago, its police superintendent, and the State's Attorney of Cook County, Illinois, alleging that defendants' seizure of automobiles and money under the Illinois Drug Asset Forfeiture Procedure Act ("Act"), 725 ILCS 150/1 *et seq.* (2008), violated their due process rights because defendants, as the Act allows, had held their property "for more than 10 days without a probable cause to detain hearing." J.A. 34a.[3] Respondents asked the district court to certify a class of "persons who have had, or will have, property seized by Chicago police

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[3] The Cook County State's Attorney is petitioner here. Chicago and its police superintendent have informed the Court that they adopt the position of State's Attorney Alvarez and do not intend to file briefs in this case.

officers" and were not or will not be given a "prompt post-seizure probable cause to detain hearing," declare that respondents "have a due process right to a prompt post-seizure probable cause hearing" and that defendants must hold such a hearing "within ten business days of any seizure," and enjoin defendants' alleged "current practice and policy of seizing property and retaining custody for months without a judicial determination of probable cause." *Id.* at 35a-36a.

Previously, the Seventh Circuit had refused to recognize a due process entitlement to a prompt, post-seizure probable cause hearing, for this Court had "made clear that the Constitution does not require any procedure prior to the actual forfeiture proceeding." *Jones v. Takaki*, 38 F.3d 321, 324 (7th Cir. 1994) (relying on *United States v. Von Neumann*, 474 U.S. 242 (1986)). Bound by *Jones*, the district court below dismissed respondents' complaint before defendants had an opportunity to file an answer. Pet. App. 12a. But on appeal the Seventh Circuit reversed, overruled *Jones*, and invalidated the Act. *Id.* at 8a-11a. Applying the balancing test set forth in *Mathews*, the court focused on the "length of time which can result" between the seizure of property pursuant to the Act and any opportunity to contest probable cause, as well as the "hardship posed" by the loss of an automobile, particularly on "innocent owner[s]." *Id.* at 8a, 10a. The court remanded the case to the district court to fashion "appropriate procedural relief," consistent with its view that owners of seized property must receive notice and a "prompt" hearing at which they have a chance "to test the validity of the retention of the property" as a means of "protect[ing] the rights of both an innocent owner and anyone else who has been

deprived of property and * * * to see whether a bond or an order can be fashioned to allow the legitimate use of the property while the forfeiture proceeding is pending." *Id.* at 9a-10a.

Petitioner filed a request for rehearing, seeking an opportunity to answer respondents' complaint, contest the allegations at trial, and present evidence that—although the Act announces baseline, state-wide protections—the Cook County State's Attorney's Office already provides the type of post-seizure process contemplated by the panel decision below. The Seventh Circuit denied the petition for rehearing, Pet. App. 14a, and, on February 23, 2009, this Court granted certiorari.

SUMMARY OF ARGUMENT

The decision below rests on three fundamental errors. First, the Seventh Circuit's wholesale invalidation of the Act is impossible to square with the well-established rule that plaintiffs raising facial challenges must prove a statute unlawful in all its potential applications. Notwithstanding that respondents brought their suit as an as-applied challenge, the court below found the Act facially unconstitutional based on the complaint alone, without regard to often stark differences among enforcing jurisdictions and claimants' individual circumstances. Whatever legal test the Court applies to respondents' claims, the judgment below may be affirmed only if the Act would fail that test under any conceivable set of circumstances.

Second, even if *Mathews* provides the appropriate analysis for judging respondents' claims, the Seventh

Circuit applied *Mathews* incorrectly by conflating the need to establish probable cause and Illinois' innocent owner defense. No constitutional entitlement to an "innocent owner" defense exists, and under *Von Neumann* the availability of this exemption from forfeiture therefore cannot form the basis of a procedural due process claim.

Finally, the Seventh Circuit erred in choosing to apply the *Mathews* analysis in the first place. *Mathews* originated as a way to evaluate due process claims in the context of modern, administrative law and has never been applied to due process challenges across the board. The Act is properly analyzed, if not (as petitioner ably argues) under the test set forth in *Barker v. Wingo*, 407 U.S. 514 (1972), then under the "reasonableness" standard long used to judge the constitutionality of the seizure and detention of property under the Fourth Amendment.

ARGUMENT

I. Whichever Test The Court Applies, It Must Accommodate Widely Varying Circumstances.

In remanding the case for the district court to "fashion appropriate procedural relief"—including notice and a "prompt" post-seizure, probable cause hearing in advance of the actual forfeiture hearing—the Seventh Circuit facially invalidated the Act. Pet. App. 10a. Nothing was left standing. The Act may never be enforced without an interim hearing, no matter how insignificant the hardship imposed by the temporary deprivation of the property or how great the administrative burden. In using *Mathews* to invalidate the Act wholesale, however, the court below

ignored this Court's admonitions, recently reiterated, that a state statute should be invalidated only where "'no set of circumstances exists under which the Act would be valid,' *i.e.*, * * * the law is unconstitutional in all of its applications." *Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184, 1190 (2008) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)).[4]

1. "A facial challenge to a legislative Act is * * * the most difficult challenge to mount successfully." *Salerno*, 481 U.S. at 745; see also *Wash. State Grange*, 128 S. Ct. at 1190 ("all agree that a facial challenge must fail where the statute has a plainly legitimate sweep") (internal quotations and citation omitted). This is so for at least three reasons. First, facial challenges "often rest on speculation," and thus "raise the risk of 'premature interpretation of statutes on the basis of factually barebones records.'" *Wash. State Grange*, 128 S. Ct. at 1191 (quoting *Sabri v. United States*, 541 U.S. 600, 609 (2004)). Second, they "run contrary to the fundamental principle of judicial

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[4] The Seventh Circuit's error stems at least in part from its invalidation of the Act before defendants had any opportunity to answer the complaint. But *amici* States do not contend that a statute may never be facially invalidated based on a complaint alone, and thus do not seek review of the petition's second question (on which the Court declined certiorari). Rather, *amici* urge that the need to be sensitive to the burden in mounting a successful facial challenge should inform the Court's determination regarding the appropriate due process analysis against which the Act should be tested, as well as the application of that analysis to the Act.

restraint that courts should neither 'anticipate a question of constitutional law in advance of the necessity of deciding it' nor 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" *Ibid.* (quoting *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, *J.*, concurring)). "Finally, facial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution." *Ibid.* For this last reason, courts must "keep in mind that '[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people.'" *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1623 (2008) (op. of Stevens, *J.*) (quoting *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329 (2006)).

Thus, in *Salerno*, the Court upheld the Bail Reform Act, for "[t]he fact that [the Act] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid." 481 U.S. at 745. And in *Sabri*, the Court declined to invalidate a bribery statute on its face because, "[a]lthough passing on the validity of a law wholesale may be efficient in the abstract," "any gain is often offset by losing the lessons taught by the particular, to which common law method normally looks." 541 U.S. at 608-609. Most recently, in *Washington State Grange*, the Court refused to hold Washington's blanket primary system facially invalid. See 128 S. Ct. at 1187. That the system "could conceivably be" implemented in a constitutional manner was "fatal" to the facial challenge. *Id.* at 1194-1195; see also *Crawford*, 128 S. Ct. at 1615, 1621-1622

(op. of Stevens, *J.*) (holding that "the evidence in the record is not sufficient to support a facial attack on the validity" of Indiana's law requiring government-issued photo identification to vote, while emphasizing the "heavy burden of persuasion" borne by plaintiffs in facial challenges, and the need "to give appropriate weight to the magnitude of that burden").

2. This Court has recognized the same need to evaluate case-specific facts in resolving due process challenges in general, and challenges to civil forfeiture statutes in particular. In *United States v. $8,850*, 461 U.S. 555 (1983), the Court emphasized that determining "whether the basic due process requirement of fairness has been satisfied" in the civil forfeiture context "necessarily depends on the facts of the particular case." *Id.* at 565; accord *id.* at 565 n.14 (noting that due process inquiry "depends so heavily on the context of the particular situation"). The Court accordingly applied the *Barker* test because its "flexible approach * * *, which 'necessarily compels courts to approach speedy trial cases on an *ad hoc* basis,'" is "an appropriate inquiry for determining whether the flexible requirements of due process have been met." *Id.* at 564-565 (quoting *Barker*, 407 U.S. at 530). Even the *Mathews* test, properly applied, recognizes that "due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances," and therefore seeks to identify "such procedural protections as the particular situation demands." 424 U.S. at 334 (internal quotations and citations omitted).

Thus, under either the *Barker*/*$8,850* analysis urged by petitioner or the *Mathews* balancing

embraced by respondents and adopted by the Seventh Circuit, a proper assessment of respondents' constitutional challenge must consider the facts and circumstances of each case. Tellingly, respondents conceded as much below, arguing that "the better course of action is to remand for discovery and full development of the facts" because the "*Mathews* inquiry is fact intensive and the facts are not developed in this case." Reply Brief of Plaintiff-Appellant Chermane Smith at 24, *Smith v. City of Chicago*, 07-1599 (7th Cir. Nov. 21, 2007). In invalidating the Act wholesale, the court below failed to heed this admonition.

3. The Act sets deadlines by which the State must send notice to the vehicle's owner and conduct the forfeiture hearing. In holding the Act facially invalid, the court below implicitly (but necessarily) determined that *Mathews* balancing requires a preliminary hearing under any conceivable set of circumstances. But this ignores that the Act applies to numerous independent jurisdictions, and to a broad spectrum of individual circumstances.

For some people, deprivation of their automobile pending forfeiture proceedings will not impose a substantial hardship; they may have a second car, for example, or live in an area where public transportation is readily available. In other words, while the Seventh Circuit's view that "[o]ur society is * * * highly dependent on the automobile" may be correct as a general matter, Pet. App. 8a, that does not mean that there exists "no set of circumstances" under which the Act would be valid. Indeed, even the court below acknowledged that the loss imposed by the seizure of

one's car "is hard to calculate," *ibid.*, but that makes it impossible to conclude—much less to hold with the confidence needed to override the legislative will—that the private interest the court identified exists to an equal extent in all circumstances. And the court's refusal to allow petitioner even to answer the complaint and put respondents to their proof resulted in the Act's invalidation on a "barebones record" consisting solely of speculation, as the Court's cases prohibit. See *supra* pp. 7-8.

Moreover, in acknowledging that "the preforfeiture hearing would impose some"—but apparently not a sufficiently great—"administrative burden on [Chicago]," Pet. App. 9a, yet invalidating the Act as it applies throughout Illinois, the Seventh Circuit failed to consider that the extent of the burden will vary from place to place. Illinois has 102 counties, and Cook County, where Chicago is located, is by far the largest. While the burden on defendants of providing preforfeiture hearings might be tolerable, as the court below implied—although it took no evidence on this point, notwithstanding respondents' concession that "whether and to what extent an informal pretrial hearing would affect [defendants] is unknown," Reply Brief of Plaintiff-Appellant Chermane Smith at 24, *Smith v. City of Chicago*, 07-1599 (7th Cir. Nov. 21, 2007)—the impact on other governmental units is likely to be different and, in many cases, far greater.

Smaller counties within Illinois, and in other States, have fewer prosecutorial and law enforcement resources. The Seventh Circuit cited two States (Arizona and Florida) that have determined that the administrative burden of preliminary hearings is

sufficiently manageable to require them. Pet. App. 9a. But the vast majority of other States have reached a different conclusion. See *supra* pp. 1-2 n.1 & Table A. And the Seventh Circuit's mandate goes even further than Arizona's statute, which does not contemplate adjudication of the issue of innocent ownership at the preliminary hearing. See *supra* p. 2 n.2. Because the facts underlying innocent ownership are known solely by the claimant, and thus unavailable to the State without discovery, a hearing that includes innocent ownership will be even more burdensome than one on probable cause alone.

By engaging in across-the-board assessments of the interests at stake, likely over-estimating the private interest and under-estimating the government's interest in many cases, the Seventh Circuit's decision thus rests on hypotheticals and speculation about potential applications of the Act. In proceeding this way, the court imposed too exacting a standard on the power of the Illinois General Assembly to legislate for incalculable future circumstances. If this case is to proceed as a facial challenge (contrary to respondents' complaint), respondents must be held to their burden of establishing that the Act fails under any circumstances and in any Illinois county. Respondents cannot carry this burden; accordingly, whatever test the Court applies, the judgment below should be reversed and the case remanded for discovery and an adjudication of respondents' constitutional challenge as applied to the facts of their case.

II. Even Under *Mathews*, The Judgment Below Must Be Reversed Because The Seventh Circuit Erroneously Conflated The "Innocent Owner" Defense With The State's Need To Prove Probable Cause.

Even if *Mathews* were the proper standard, the court below misapplied this test by relying heavily on a legally improper factor. In balancing public and private interests, the Seventh Circuit stressed the private interests of "innocent owner[s]" and sought to remedy the "hardship" imposed on these non-culpable individuals by furnishing them with an early opportunity to contest the detention of their property. Pet. App. 8a. A concern for innocent owners also undergirds the Second Circuit's invalidation of a similar law in *Krimstock v. Kelly*, upon which the Seventh Circuit relied. See 306 F.3d 40, 53 (2d Cir. 2002). But this reliance on the "innocent owner" exemption to forfeiture is fundamentally flawed, for there is no due process right to a prompt determination of "innocent ownership," and this exemption should not be part of the Seventh Circuit's proposed new preliminary hearing in any event.

1. Under Illinois forfeiture law, probable cause means "reasonable grounds for the belief that there exists a nexus between the property and illegal drug activity, supported by less than *prima facie* proof but more than mere suspicion." *People v. 1945 N. 31st St.*, 841 N.E.2d 928, 942 (Ill. 2005). It "requires only a probability or substantial chance of the nexus and not an actual showing." *Ibid.* Under the Act, probable cause is the standard the State must meet to establish that property is subject to forfeiture in judicial *in rem*

proceedings. See 725 ILCS 150/9(G) (2008). And as in many States, Illinois law never requires the State to prove any culpability on the part of the property owner. See *ibid.* Establishing probable cause alone constitutes the "State's [c]ase in [c]hief." *1945 N. 31st St.*, 841 N.E.2d at 940.

The Act does provide an "exemption" from forfeiture for property owners who can demonstrate their innocence by proving the existence of certain statutory factors. 725 ILCS 150/8 (2008); see also *1945 N. 31st St.*, 841 N.E.2d at 940 (exemption did not apply because owner "was unable to satisfy all of the pertinent conditions" of the Act, even though she was not involved in drug transaction and was not "legally accountable for the conduct giving rise to the forfeiture") (internal quotations omitted). Whether a claimant has satisfied the exemption is addressed in a separate "portion" of the proceedings, called the "[c]laimant's [c]ase," *id.* at 942, 944, which is subject to stricter evidentiary rules than the State's case, see 725 ILCS 150/9(B) (2008).

But this "innocent owner" exemption—with its strict evidentiary burden on the owner—is not constitutionally required. "[A] long and unbroken line of cases holds that an owner's interest in property may be forfeited by reason of the use to which the property is put even though the owner did not know that it was to be put to such use." *Bennis v. Michigan*, 516 U.S. 442, 446 (1996). The claimant in *Bennis* "did not know that her [jointly owned] car would be used in an illegal activity that would subject it to forfeiture," but the Court nevertheless concluded that "the Due Process Clause of the Fourteenth Amendment [did] not protect

her interest against forfeiture by the government." *Id.* at 449. Thus, "well-established authority reject[s] the innocent-owner defense" as a constitutional entitlement. *Id.* at 451; see also *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 683 (1974) ("the innocence of the owner of property subject to forfeiture has almost uniformly been rejected as a defense").

2. Because the "innocent owner" exemption is not part of the State's probable cause showing, adjudication of this issue would not occur during a preliminary, probable cause hearing. Respondents recognized this below: they requested a probable cause hearing, but they never argued that they should be permitted to advance an "innocent owner" defense in that proceeding. See J.A. 36a; Brief of Plaintiff-Appellant Chermane Smith at 12, *Smith v. City of Chicago*, 07-1599 (7th Cir. May 29, 2007).

Nor is there any independent due process entitlement to a prompt adjudication of an "innocent owner" defense. In *Von Neumann*, this Court rejected the argument that the government's failure to provide for speedy disposition of the claimant's remission petition violated due process because, while remission is available as a matter of federal statutory law, "remission proceedings are not *necessary* to a forfeiture determination, and therefore are not constitutionally required." 474 U.S. at 250 (emphasis in original). "Thus there is no constitutional basis for a claim that respondent's interest in the car, or in the money put up to secure the bond, entitles him to a speedy answer to his remission petition." *Ibid.*

Similarly, the State need not prove that respondents are in any way culpable for the conduct that made their property forfeitable—the absence of an "innocent owner" exemption is not an element of forfeiture under the Constitution or state law. See *Bennis*, 516 U.S. at 446, 451; 725 ILCS 150/9(G). Under the logic of *Von Neumann*, therefore, respondents have no constitutional entitlement to a speedy resolution of any "innocent owner" defense. See 474 U.S. at 250. To be sure, the decision whether to allow remission was discretionary in *Von Neumann*, while Illinois law makes the "innocent owner" exemption mandatory if a claimant can prove each of its elements, but this is constitutionally irrelevant. Cf. *McMillan v. Pennsylvania*, 477 U.S. 79, 92 (1986) (due process evaluation of sentencing factor would not change if factor were discretionary rather than mandatory). And even if respondents could claim some due process right to a rapid "innocent owner" determination, they could not demand its adjudication at a preliminary probable cause hearing any more than a criminal defendant could insist that an insanity defense be adjudicated at a hearing required by *Gerstein v. Pugh*, 420 U.S. 103 (1975).

3. In short, the Seventh Circuit should not have found—and, indeed, respondents never sought—a due process right to prompt adjudication of Illinois' "innocent owner" exemption. And when the exemption is properly put to one side, the appellate court's analysis necessarily fails, even under *Mathews*.

Concern for the rights of "innocent owners" permeated the decision below. In the court's own words, the whole "point" of the proposed preliminary

hearing "is to protect the rights of both an innocent owner and anyone else who has been deprived of property." Pet. App. 10a. When assessing the first *Mathews* factor, the private interest, the Seventh Circuit thus emphasized the plight of the "owner of an automobile which is seized because the driver—not the owner—is the one accused and whose actions cause the seizure." Pet. App 8a. As explained, however, the preliminary hearing that the Seventh Circuit demands would not vindicate the rights of innocent owners; properly constituted, it would review solely the police determination that the vehicle was likely involved in illegal drug activity.

The opinion below does not address the second *Mathews* factor, the likelihood that additional procedural safeguards would reduce errors. But that likelihood is low when the analysis is properly limited to the probable cause determination. While an arresting officer may conclude erroneously that there is a reasonably likely nexus between the property and illegal drug activity, the chance of error is relatively small and the additional safeguard of judicial review would likely yield only minimal benefits. See *Gerstein*, 420 U.S. at 120 ("These adversary safeguards are not essential for the probable cause determination required by the Fourth Amendment. * * * This issue can be determined reliably without an adversary hearing."); *Krimstock*, 206 F.3d at 62-63 (second *Mathews* factor favors government because likelihood of error is slim).

The decision below is nearly as cursory in its treatment of the third *Mathews* factor, the governmental interest, acknowledging merely that preliminary hearings "would impose some

administrative burden" and, moreover, that the government has an interest in "being certain that a vehicle is not destroyed before a court can issue a judgment" of forfeiture. Pet. App. 9a. Putting aside that this vastly underestimates the burden of adjudicating probable cause and innocent ownership shortly after a seizure, see *supra* p. 12, the weight of this factor in the calculus would surely increase if the government's interest were properly identified not as in possessing the property of possibly innocent owners but in "confiscat[ing] property used in violation of the law." *United States v. Ursery*, 518 U.S. 267, 284 (1996); see also *8,850*, 461 U.S. at 565-566 (government has "an interest in a rule that allows [it] some time to investigate the situation in order to determine whether the facts entitle the Government to forfeiture"); *Calero-Toledo*, 416 U.S. at 686-687 ("Forfeiture of conveyances that have been used—and may be used again—in violation of the narcotics laws fosters the purposes served by the underlying criminal statutes, both by preventing further illicit use of the conveyance and by imposing an economic penalty, thereby rendering illegal behavior unprofitable.").

In sum, even if *Mathews* were applicable here (and it is not, see *infra* Part III), the court below critically misapplied it by including—indeed, focusing chiefly upon—interests vindicated by the state law "innocent owner" exemption. This Court should hold that the Act satisfies even *Mathews*, when properly applied, or at a minimum vacate the Seventh Circuit's judgment and remand for proper application of the *Mathews* factors, excluding the "innocent owner" exemption.

III. The *Mathews* Test Does Not Apply To Civil Forfeiture.

The Seventh Circuit embraced respondents' argument that the applicable analysis for their due process claim is the *Mathews* balancing test, which asks courts to weigh the private and governmental interests at stake, taking into account the likelihood that additional procedural safeguards will reduce errors. See 424 U.S. at 335. The Court acknowledged that *Mathews* arose in a very different context—"the termination of Social Security disability benefit payments"—but found that its analysis is "pervasive" and "has been used in everything." Pet. App. 6a n.2. But this Court has never understood *Mathews' ad hoc* balancing to apply so broadly, and it should resist the invitation to expand *Mathews* here. As petitioners explain, Pet. Br. 36-39, 46, 58-60, the traditional speedy-trial test set forth in *Barker* and applied to civil forfeiture in *$8,850* and *Von Neumann* is applicable where, as here, the concern is that too much time elapses between a seizure and the adversarial hearing on its validity. If not the *Barker* test, however, the Court should evaluate respondents' claims pursuant to the Fourth Amendment "reasonableness" standard long used to ensure compliance with the probable cause requirement for seizure and detention of persons and property.[5]

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[5] In the Seventh Circuit, petitioner argued that *Mathews* does not provide a "one-size-fits-all" analysis for due process claims and that its test is inapplicable because it is not "specifically tailored" to the civil forfeiture context. State's Attorney Br. 19. To be sure, petitioner urged the court to reaffirm its own prior decision in *Jones*, which

"[T]he *Mathews* balancing test was first conceived to address due process claims arising in the context of administrative law." *Medina v. California*, 505 U.S. 437, 444 (1992); accord *Dusenbery v. United States*, 534 U.S. 161, 167 (2002). And although the Court has "since invoked *Mathews* to evaluate due process claims in other contexts," the Court has "never viewed *Mathews* as announcing an all-embracing test for deciding due process claims." *Dusenbery*, 534 U.S. at 167-168. Indeed, *Mathews* suffers from several acknowledged limitations. Its "balancing" analysis "is simply an ad hoc weighing which depends to a great extent upon how the Court subjectively views the underlying interests at stake." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 562 (1985) (Rehnquist, *J.*, dissenting). This "lack of any principled standards" means that the *Mathews* test can give rise to decisions

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relied on the *Barker* test, see *id.* at 20, but that does not prevent this Court from looking to the Fourth Amendment "reasonableness" test if it concludes *Barker* does not apply. Identification of the appropriate standard for evaluating respondents' due process claim—among all available alternatives—is "'predicate to an intelligent resolution of the question presented.'" *Caterpillar, Inc. v. Lewis*, 519 U.S. 61, 75 n.13 (1996) (quoting *Ohio v. Robinette*, 519 U.S. 33, 38 (1996)). Even respondents acknowledge that the issue here is whether due process requires an interim adversarial hearing independent of the actual forfeiture proceeding and that this inquiry is not limited to any particular test or tests. See Opp. Br. i. Accordingly, our argument is "fairly included" within the question presented, U.S. Sup. Ct. R. 14.1(a), and may properly be considered by this Court, see *Caterpillar*, 519 U.S. at 75 n.13; *Robinette*, 519 U.S. at 38; *Vance v. Terrazas*, 444 U.S. 252, 258-259 n.5 (1980).

that are both "unpredictable" and "devoid of any principles which will either instruct or endure." *Id.* at 562-563.

1. Accordingly, members of the Court have cautioned against "indiscriminately appl[ying] [its] balancing analysis" to due process claims "without regard to whether the procedure under challenge was (1) a traditional one and, if so, (2) prohibited by the Bill of Rights." *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 36 (1991) (Scalia, *J.*, concurring in the judgment); see also *id.* at 40 (Kennedy, *J.*, concurring in the judgment) ("Justice Scalia's historical approach to questions of procedural due process has much to commend it," although "widespread adherence to a historical practice" may not "always foreclose[] further inquiry"); *Hamdi v. Rumsfeld*, 542 U.S. 507, 576 (2004) (Scalia, *J.*, joined by Stevens, *J.*, dissenting) (rejecting plurality's use of *Mathews* balancing "where the Constitution and the common law already supply an answer"); *id.* at 594 (Thomas, *J.*, dissenting) (also rejecting *Mathews* test as "the appropriate analytical tool with which to analyze this case").

And in fact where no newly recognized property interest is at stake (as it was in *Mathews*), the Court often defines due process requirements by looking to more specific constitutional entitlements and to historical practice. This was so in *Medina*, where the Court held that "the *Mathews* balancing test does not provide the appropriate framework for assessing the validity of state procedural rules which * * * are part of the criminal process." 505 U.S. at 443. Instead, the Court made a "narrower inquiry," based on historical practice, into whether the rule "'offends some principle

of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Id.* at 445 (quoting *Speiser v. Randall*, 357 U.S. 513, 523 (1958)). In the criminal context, the Court recognized the limited effect of due process as a freestanding right, "'[b]eyond the specific guarantees enumerated in the Bill of Rights.'" *Id.* at 443 (quoting *Dowling v. United States*, 493 U.S. 342, 352 (1990)). "[T]he criminal process is grounded in centuries of common-law tradition," and it was to that tradition that the Court looked first and foremost to ascertain the bounds of fundamental fairness. *Id.* at 445-446; accord *Herrera v. Collins*, 506 U.S. 390, 407-408 (1993).

Likewise, in *Dusenbery*, the Court rejected a claimant's request to apply *Mathews* to his due process challenge to the adequacy of the notice the government provided of its intent to forfeit property seized during the execution of a search warrant. The proper test, the Court explained, was the "well-settled practice" set forth in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), "which espouse[d] a more straightforward test of reasonableness under the circumstances." 534 U.S. at 167-168. Even the dissent did not doubt the applicability of this historical, reasonableness test in lieu of *Mathews*. See *id.* at 173 (Ginsburg, *J.*, dissenting) ("The Court correctly identifies" *Mullane* as "the foundational case on reasonable notice as a due process requirement.").

And in *Weiss v. United States*, 510 U.S. 163 (1994), the Court declined to apply *Mathews* to a due process challenge to a facet of the military justice system. The Court explained that neither *Mathews* nor *Medina* (whose test the government urged) "arose in the

military context," and thus neither "supplie[d] the appropriate analytical framework" for determining what process is due in a court-martial proceeding. 510 U.S. at 177. Rather, the proper test was the military-specific one previously set out in *Middendorf v. Henry*, 425 U.S. 25 (1976). See 510 U.S. at 177. Again, the Court relied on standards evolved in the same narrow legal context to determine what due process demands.

2. Especially relevant here are the Court's decisions in *Gerstein* and *Graham v. Connor*, 490 U.S. 386 (1989). In those decisions, the Court once again looked to existing legal standards developed specifically for the brand of claim at issue, this time applying the longstanding, Fourth Amendment "reasonableness" test to plaintiffs' due process challenges to the seizure and detention of their person. In *Gerstein*, the Court held that procedures for detaining a criminal defendant pending trial are judged under the Fourth Amendment, rather than more general due process norms, because:

> [t]he historical basis of the probable cause requirement is quite different from the relatively recent application of variable procedural due process in debtor-creditor disputes and termination of government-created benefits. The Fourth Amendment was tailored explicitly for the criminal justice system, and its balance between individual and public interests always has been thought to define the "process that is due" for seizures of person or property in criminal cases, including the detention of suspects pending trial.

420 U.S. at 125 n.27. The Court thus rejected plaintiffs' claim to an adversary hearing on their pre-trial detention, because its "safeguards are not essential for the probable cause determination required by the Fourth Amendment." *Id.* at 120.

Similarly, in *Graham*, the Court held that the Fourth Amendment, not the Due Process Clause, restricts the use of force in effecting a personal seizure. See 490 U.S. at 395. Unlike the latter, "the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct," and therefore it "must be the guide for analyzing these claims." *Ibid.* The Fourth Amendment's "objective reasonableness" test thus sets the standard for determining the constitutionality of a seizure, both in terms of "*when* it is made" and "*how* it is carried out." *Id.* at 388, 395 (emphasis in original); accord *Portuondo v. Agard*, 529 U.S. 61, 74 (2000); *Conn v. Gabbert*, 526 U.S. 286, 293 (1999); *County of Sacramento v. Lewis*, 523 U.S. 833, 842 (1998).

So too here, the reasonableness requirement of the Fourth Amendment furnishes an "explicit textual source of constitutional protection" for use in assessing respondents' claims that their property was seized and detained without a constitutionally adequate probable cause determination. It would be an odd result indeed if the Fourth Amendment provided all the process due when the government detained or used force in seizing a person, but that these same protections were inadequate when the government detained personal property.

To be sure, the Fourth Amendment's probable cause requirement is only one of several ways in which the Constitution protects the rights of those whose property has been seized for forfeiture. *Cf. Gerstein*, 420 U.S. at 126 n.27 ("the Fourth Amendment probable cause determination is in fact only the *first* stage in an elaborate system, unique in jurisprudence, designed to safeguard the rights of those accused of criminal conduct") (emphasis in original). The Constitution also provides safeguards against excessive delay in initiating the actual forfeiture proceedings, see *$8,850*, 461 U.S. at 564, and inadequate notice, see *Dusenbery*, 524 U.S. at 167-168. In addition, the Eighth Amendment's Excessive Fines Clause applies to civil *in rem* forfeiture proceedings, see *Austin v. United States*, 509 U.S. 602, 604 (1993), as does the Fourth Amendment's exclusionary rule, see *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 696 (1965), and, in some circumstances, the Fifth Amendment privilege against self-incrimination, see *United States v. United States Coin & Currency*, 401 U.S. 715, 721-722 (1971). Insofar as the initial probable cause determination is concerned, however, *Gerstein* and its progeny make clear that the Fourth Amendment alone applies.

3. Because the lower court used *Mathews* to assess the constitutionality of the Act, this Court should vacate the judgment below and remand for application of the Fourth Amendment's reasonableness test. See, *e.g.*, *Wilson v. Arkansas*, 514 U.S. 927, 936 (1995) ("we leave to the lower courts the task of determining the circumstances under which an unannounced entry is reasonable under the Fourth Amendment"); *Ker v. California*, 374 U.S. 23, 33 (1963) ("the reasonableness

of a search or seizure is in the first instance a substantive determination to be made by the trial court from the facts and circumstances of the case").

Although the lower courts must be afforded an opportunity to apply the correct test, all indications suggest the Act is constitutional under a Fourth Amendment analysis. "In determining when a search or seizure is unreasonable," the Court "begin[s] with history" and "look[s] to the statutes and common law of the founding era to determine the norms that the Fourth Amendment was meant to preserve." *Virginia v. Moore*, 128 S. Ct. 1598, 1602 (2008); accord *Atwater v. City of Lago Vista*, 432 U.S. 318, 326 (2001) ("In reading the Amendment, we are guided by 'the traditional protections against unreasonable searches and seizures afforded by the common law at the time of the framing.'") (quoting *Wilson*, 514 U.S. at 931). As petitioner explains, this Court's earliest cases recognize that the judicial forfeiture proceeding itself is sufficient to protect the rights of property owners, and no interim probable cause hearing is required. See Pet. Br. 34-35. This is confirmed by the Court's subsequent determination—in a case upholding summary proceedings for the collection of unpaid income taxes—that "mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of liability is adequate." *Phillips v. Commissioner of Internal Revenue*, 283 U.S. 589, 596-597 (1931).

And if historical practices are not definitive on this point, the second stage of the Fourth Amendment inquiry—which requires courts, in cases where "history

has not provided a conclusive answer," to "analyze[] a search or seizure in light of traditional standards of reasonableness 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests,'" *Moore*, 128 S. Ct. at 1604 (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999))—should confirm the result.

"[R]easonableness under the Fourth Amendment does not require" the State to "employ[] the least intrusive means" available to serve its legitimate interests. *Bd. of Ed. of Indep. Sch. Dist. v. Earls*, 536 U.S. 822, 837 (2002); accord *Illinois v. Lafayette*, 462 U.S. 640, 647 (1983); *Cady v. Dombrowski*, 413 U.S. 433, 447 (1973). Thus, the Fourth Amendment test may permit a wider range of governmental conduct than *Mathews*. See, *e.g.*, *Lafayette*, 462 U.S. at 648 (reasonableness test does not permit courts to "second-guess" the "practical administrative method[s]" of law enforcement). In fact, when "assessing whether a detention [wa]s too long in duration," this Court has declined to find a Fourth Amendment violation merely because "some other alternative was available," so long as the government did not "act[] unreasonably in failing to recognize or to pursue it." *United States v. Sharpe*, 470 U.S. 675, 687 (1985). Here, the Seventh Circuit invalidated the Act because, in its view, early adversarial hearings are the best means of protecting the rights of property owners (particularly innocent ones), notwithstanding the acknowledged—and as of yet undetermined—cost to the particular government entity. Pet. App. 8a-10a. But the government is not required to adopt an alternate method, much less the

"least intrusive" one, merely because it is "available." Proper application of the Fourth Amendment reasonableness test would not hold the government to so high a standard, indicating that the Act would be upheld under the correct test.

4. Perhaps the most obvious rejoinder to the foregoing reliance on the Fourth Amendment is this Court's decision in *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993) ("*Good*"), upon which the Seventh Circuit itself relied. Pet. App. 5a-6a. In that case, a sharply divided Court applied *Mathews* to hold that due process requires the government to afford notice and an adversarial hearing prior to seizing *real* property for civil forfeiture. See 510 U.S. at 46, 53. The majority agreed that "the Fourth Amendment applies to searches and seizures in the civil context," including seizures for civil forfeiture, "and may serve to resolve the legality of these governmental actions without reference to other constitutional provisions." *Id.* at 51. But it concluded that "even assuming that the Fourth Amendment were satisfied in this case," the Due Process Clause imposed its own, additional requirements. *Id.* at 52.

The *Good* majority carefully limited its holding to seizures of real property. See *infra* pp. 33-34. If the Court were to conclude that *Good* is nevertheless applicable to personal property, however, its reasoning should be rejected for the reasons described in the dissent.

In particular, two dissenting members of the Court would have held that "the Fourth Amendment specifically governs the process afforded in the civil forfeiture context," because it is through that

Amendment, not the Due Process Clause, that the Constitution balances "the people's security in their persons, houses, papers, and effects and the public interest in effecting searches and seizures for law enforcement purposes." 510 U.S. at 67, 69 (Rehnquist, *J.*, joined by Scalia, *J.*, concurring in part and dissenting in part) (citing *Zurcher v. Stanford Daily*, 436 U.S. 547, 559 (1978); *Maryland v. Buie*, 494 U.S. 325, 331 (1990); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989)).[6] The dissent explained that the majority's "fixation on *Mathews* sharply conflicts with both historical practice and the specific textual source of the Fourth Amendment's 'reasonableness' inquiry." *Id.* at 67.

The dissent's reasoning should control here. First, although the majority relied on *Soldal v. County of Cook*, 506 U.S. 56 (1992), to dismiss the dissent's "view that the applicability of" the Fourth Amendment "pre-empts the guarantees" of the Fourteenth, *Good*, 510 U.S. at 49, *Soldal* cannot bear so much weight. On review there was a decision by the court of appeals *declining* to apply the Fourth Amendment to claims

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[6] Two other members of the Court would have rejected plaintiff's challenge to the forfeiture statute as applied in that case. See 510 U.S. at 77 (O'Connor, *J.*, concurring in part and dissenting in part) ("But this case is an *as applied* challenge to the seizure of Good's property; on these facts, I cannot conclude that there was a constitutional violation.") (emphasis in original); accord *id.* at 83 (Thomas, *J.*, concurring in part and dissenting in part) ("in circumstances such as these, a preseizure hearing is not required as a matter of constitutional law").

arising out of the seizure of property. See 506 U.S. at 60. In holding that plaintiffs' claims must be evaluated in terms of the Fourth Amendment, the Court in *Soldal* reiterated that in cases where both the Fourth Amendment and the Due Process Clause "target[] the same sort of governmental conduct," the Court must choose "the more 'explicit textual source of constitutional protection' over the 'more generalized notion of substantive due process.'" *Id.* at 70 (quoting *Graham*, 490 U.S. at 394-395). As explained, see *supra* pp. 23-25, this is such a case.[7]

Second, while both the majority and the dissent pointed to *Calero-Toledo*, where this Court held that the Constitution does not require notice or a hearing prior to seizing a yacht for forfeiture, the dissent's view of that case is more easily reconciled with the Court's later decisions. Compare *Good*, 510 U.S. at 51, with *id.* at 69 (Rehnquist, J., concurring in part and dissenting in part). *Calero-Toledo* was decided prior to *Gerstein* and *Graham* and, as a result, before this Court made

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[7] In an effort to resolve "what at first blush may seem a tension between" *Graham* and *Gerstein* "on the one hand" and *Good* and *Soldal* "on the other," one member of the Court offers a "rule of reserving due process for otherwise homeless substantial claims" while declining to apply the Due Process Clause "when doing so would have duplicated protection that a more specific constitutional provision already bestowed." *Albright v. Oliver*, 510 U.S. 266, 288 & n.2 (1994) (Souter, J., concurring in the judgment). Even this rule recognizes, however, that due process has no role where a constitutional claim is covered by a specific constitutional provision, including the Fourth Amendment, see *ibid.*, as it is here.

clear that the Fourth Amendment provides the only relevant analysis in circumstances where it applies of its own force. Thus, *Calero-Toledo*'s failure to reference the Fourth Amendment is not surprising. Nevertheless, as the *Good* dissent recognized, *Calero-Toledo* focused its analysis on the historical treatment of civil forfeiture procedures, as the Fourth Amendment test demands. See *Good*, 510 U.S. at 69 (Rehnquist, *J.*, concurring in part and dissenting in part) ("As we decided in *Calero-Toledo* * * *, there is no need to look beyond the Fourth Amendment in civil forfeiture proceedings involving the Government because *ex parte* seizures are 'too firmly fixed in the punitive and remedial jurisprudence of this country to be now displaced.'") (quoting *Calero-Toledo*, 416 U.S. at 686). Moreover, because *Calero-Toledo rejected* plaintiff's claim to additional process, the test that the Court applied there, to the extent it does not track the Fourth Amendment standard exactly, is at best *dicta* and does not counsel in favor of the additional procedural protections respondents seek here.

The majority in *Good* also distinguished *Gerstein* and *Graham* because those cases involved "the arrest and detention of criminal suspects, subjects we have considered to be governed by the provisions of the Fourth Amendment without reference to other constitutional guarantees." 510 U.S. at 50. The majority did not doubt, however, that the Fourth Amendment applies to civil as well as criminal proceedings. See *id.* at 51. And while it sought to put *Gerstein* and *Graham* to the side based upon the "other safeguards" available in criminal proceedings to "ensure compliance" with the Constitution, *id.* at 50, this ignores the constitutional protections that attach

during civil *in rem* forfeiture proceedings—when the question is whether the elements of forfeiture are satisfied, not whether the police had probable cause for the *seizure*, see *supra* p. 25. And it does not acknowledge the "paradox[]" of providing more favorable protections to the detention of property than to the detention of the person. *Good*, 510 U.S. at 67 (Rehnquist, *J.*, concurring in part and dissenting in part); see also *supra* p. 24.

The *Good* Court also feared that "the purpose and effect of the Government's action[s]" in the forfeiture context "go beyond the traditional meaning of search or seizure" because the government "assert[s] ownership and control over the property" and thus does not limit itself to "preserv[ing] evidence of wrongdoing." 510 U.S. at 52. But this Court has consistently recognized that civil forfeiture serves a law enforcement purpose by taking property used for illegal activity out of the hands of criminals. See, *e.g.*, *Ursery*, 518 U.S. at 284 (civil forfeitures "are designed primarily to confiscate property used in violation of the law, and to require disgorgement of the fruits of illegal conduct"). This goal is reflected in the Illinois law at issue here. See 725 ILCS 150/2 (detailing legislative findings that forfeiture of property pursuant to Act "will have a significant beneficial effect in deterring the rising incidence of the abuse and trafficking of such substances within this State" and "may secure for State and local units of government some resources for deterring drug abuse and drug trafficking"). That forfeiture seeks to deter criminal conduct above and beyond preservation of evidence should be of no moment.

But *Good* is properly limited to the real property context in any event. Repeatedly, this Court has acknowledged "the unique nature of the home," and has held that "'[p]reserving the sanctity of the home, the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits, is surely an important value.'" *Frisby v. Schultz*, 487 U.S. 474, 484 (1988) (quoting *Carey v. Brown*, 447 U.S. 455, 471 (1980)); see also *Miller v. United States*, 357 U.S. 301, 307 (1958) (describing "precious interest" "summed up in the ancient adage that a man's house is his castle"). Indeed, the Court recently reaffirmed the constitutionally material distinction between an individual's interest in real property and the lesser interest in personal property, such as a vehicle. See *Arizona v. Gant*, 129 S. Ct. 1710, No. 07-542, 2009 WL 1045962, at *8 (U.S. Apr. 21, 2009) (motorist's interest "in his vehicle is less substantial than in his home").

The *Good* majority likewise recognized that the "right to maintain control over [one's] home, and to be free from governmental interference, is a private interest of historic and continuing importance," 510 U.S. at 53-54, and stressed that its holding applied to the forfeiture of real property, specifically, see, *e.g.*, *id.* at 46 ("The principal question presented is whether, in the absence of exigent circumstances, the Due Process Clause of the Fifth Amendment prohibits the Government in a civil forfeiture case from seizing real property without first affording the owner notice and an opportunity to be heard."); *id.* at 53 (*Mathews* "provides guidance" for determining "[w]hether the seizure of real property for purposes of civil forfeiture justifies such an exception"); *id.* at 61 ("[t]he constitutional limitations we enforce in this case apply

to real property in general"); *id.* at 62 ("we hold that the seizure of real property * * * is not one of those extraordinary instances that justify the postponement of notice and hearing"). Indeed, in distinguishing *Calero-Toledo*, the *Good* majority emphasized the unique nature of real property, which, unlike personal property, cannot be "'removed to another jurisdiction, destroyed, or concealed, if advance warning of confiscation were given.'" *Id.* at 52 (quoting *Calero-Toledo*, 416 U.S. at 679).

Thus, *Good* does not speak to the issue of whether *Mathews* should be applied to forfeitures of personal, as opposed to real, property. But even if *Good* did apply to personal property, its reasoning should be rejected here because it is the Fourth Amendment that protects against "unreasonable" seizures of property, and thus there is "no occasion or justification" for a court to "strike a new balance" by invalidating a seizure unless additional procedural requirements, not required by the Fourth Amendment, are met. *Stanford Daily*, 436 U.S. at 559.

CONCLUSION

The judgment of the court of appeals should be reversed; in the alternative, the judgment should be vacated and the case remanded for further proceedings.

Respectfully submitted.

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Table A

Statutory Civil Forfeiture Provisions

Alabama: Ala. Code 1975 § 20-2-93: proceedings must be instituted "promptly" following seizure; no set time for hearing.

Alaska: Alaska Stat. §§ 17.30.114, 17.30.116: ex parte probable cause determination within forty-eight hours of seizure; government must provide notice within twenty days, no set time for trial.

Arkansas: Ark. Code Ann. §§ 5-64-505(f), (g): government must file complaint within sixty days of seizure; no set time for hearing.

Arizona: Ariz. Rev. Stat. § 13-4310: court may issue order to show cause for hearing on probable cause within five business days if no prior judicial determination, even ex parte, of probable cause.

California: Cal. Health & S. § 14888.5(c): hearing shall occur within thirty days of verified claim by property owner.

Colorado: Colo. Rev. Stat. §§ 16-13-505(2)(a)-(c): government must file forfeiture complaint within sixty days of seizure and first adversarial hearing on merits may be at least 165 days following seizure.

Connecticut: Conn. Gen. Stat. § 54-36h(b): proceedings must be instituted within ninety days of seizure, followed by court ordering government to give notice to property owners, and hearing to be held "not less than two weeks after notice."

Delaware: Del. Code Ann. tit. 16, §§ 4784, 4786 and Del. Sup. Ct. R. Civ. Pro. 71.3: notice of seizure within sixty days of seizure and hearing may be at least 150 days following seizure.

Florida: Fl. Stat. Ann. § 932.703(2)(a): government must provide notice within five business days of seizure and preliminary hearing must be held within ten days after request is received.

Georgia: Ga. Code Ann. § 16-13-49(q)(4): claimant can obtain probable cause hearing within thirty-five days of seizure if no prior judicial determination, even ex parte, of probable cause, although date can be extended for good cause.

Hawaii: Haw. Rev. Stat. §§ 712A-7, 712A-9, 712A-11, 712A-12: seizing agency has thirty days to request that prosecuting attorney seek forfeiture; prosecuting attorney has forty-five days after written request from seizing agency to initiate proceedings, upon which clerk shall give notice to property owner, and hearing can be held within sixty days of filing of claim; order to show cause yielding probable cause hearing within thirty days set aside upon filing of petition.

Idaho: Idaho Code Ann. § 37-2744(d)(3): government has thirty days following seizure to institute proceedings, at which time notice must be given to property owners, and hearing can be up to thirty days from time property owner subsequently files verified answer.

Indiana: Ind. Code § 34-24-1-3(a): government must initiate proceedings within 180 days of seizure or

ninety days of written demand by property owner; no specific rule regarding timing of hearing.

Iowa: Iowa Code §§ 809.3, 809.4: property owner can institute proceedings for immediate return, and hearing may be held within thirty days afterward.

Kansas: Kan. Stat. Ann. § 60-4112(c): claimant can obtain probable cause hearing within thirty-five days of claim if no prior judicial determination, even ex parte, of probable cause, although date can be extended for good cause.

Louisiana: La. Rev. Stat. Ann. § 40:2611.C: claimant can secure probable cause hearing within thirty-five days of claim.

Maine: Me. Rev. Stat. Ann. tit. 15, § 5823.2: for vehicle, hearing can be fifty-five days after seizure.

Maryland: Md. Code Ann., Crim. Proc. §§ 12-304(b), 12-306(b), 12-308(a): for motor vehicles, complaint must be filed within forty-five days of seizure, notice given within twenty days of that and hearing within next sixty days, for total of 125 days.

Massachusetts: Mass. Gen. Laws ch. 94C § 47: no specific date petition must be filed or hearing held.

Michigan: Mich. Comp. Laws § 333.7523: forfeiture proceedings must be instituted "promptly;" no set time for hearing.

Minnesota: Minn. Stat. §§ 609.5311-609.5314: claimant must file civil action subject to standard rules of civil procedure with no specific deadline as to hearing.

Mississippi: Miss. Code Ann. §§ 41-29-177, 41-29-179: for property over $10,000, proceedings must be instituted within thirty days of seizure and hearing within thirty days of answer; for property under $10,000, claimant must file petition after receiving notice and proceedings are then governed by rules of civil procedure.

Missouri: Mo. Rev. Stat. §§ 513.607.6(2), 513.612: government must file petition within fourteen days of seizure and claimant can file motion to dismiss that must be ruled on within ten days.

Montana: Mont. Code Ann. §§ 44-12-201, 44-12-203: government must file petition within forty-five days of seizure, and hearing must be held within sixty days of filed answer, for 105-day total.

Nebraska: Neb. Rev. Stat. § 28-431(4): claimant may obtain preliminary hearing on issue of innocent ownership, not probable cause, without specific time line.

Nevada: Nev. Rev. Stat. §§ 179.1171, 179.1173, 453.301: government has sixty days to file complaint, and court should proceed as soon as practicable.

New Hampshire: N.H. Rev. Stat. Ann. §§ 318-B:17-b.II(e), 318-B:17-b.IV(c): government has sixty days to file petition, court can schedule hearing with ninety days of filing, for 150-day total.

New Jersey: N.J. Stat. Ann. §§ 2C:64-3a, f: government has ninety days following seizure to file action and court sets summary hearing "as soon as practicable" following filing of answer.

New Mexico: N.M. Stat. §§ 30-31-34, 30-31-35, 31-27-5.A, 31-27-6.C(2): government must file forfeiture complaint within thirty days, and then proceedings are held in accord with rules of civil procedure.

New York: N.Y. Pub. Health Law §§ 3388.4, 3388.9: government must institute proceedings twenty days after written demand or two years following seizure and proceedings "shall conform as much as possible to the procedure for attachment."

North Carolina: N.C. Gen. Stat. §§18B-504(d), (h), 90-112(f): no set time-line after seizure but process depends on trial for underlying offense; innocent owner can apply for return of property "at any time before forfeiture is ordered," with no set time-line for adjudication.

North Dakota: N.D. Cent. Code § 19-03.1-36.3: forfeiture proceedings must be instituted "promptly" following seizure; no specified time for hearing.

Ohio: Ohio Rev. Code Ann. § 2981.03(A)(4): property owner can petition for hearing, to be held "promptly," at which claimant may prove by preponderance of evidence that seizure was unlawful.

Oklahoma: Okla. Stat. tit. 12 § 95, tit. 63 § 2-506: one year statute of limitations on filing proceeding; no limitation on time of hearing.

Oregon: Or. Rev. Stat. § 475A.045(8): property owner can petition court for order to show cause with five days' notice to government.

Pennsylvania: 42 Pa. Cons. Stat. §§ 6801(c), 6802: proceedings must be instituted "forthwith" following seizure, and no set time for hearing.

Rhode Island: R.I. Gen. Laws §§ 21-28-5.04.2(f)-(h): seizing agency shall within thirty days of seizure send property to attorney general; for property valued under $20,000, attorney general has sixty days to file response to petition for mitigation or remission; claimant can request subsequent judicial review; for other property, attorney general has twenty days to file complaint, without specified date for hearing.

South Carolina: S.C. Code Ann. §§ 44-53-586(a), 44-53-520(c), (j), 44-53-530: property owner may petition court for rule to show cause hearing, although court may deny petition; seizing agency must submit report to prosecuting attorney within ten days or reasonable time, and proceedings must be instituted within reasonable time, with no set time for hearing.

South Dakota: S.D. Codified Laws §§ 34-20B-76, 34-20B-88: government must institute proceedings within thirty days of seizure, trial must be within sixty days after filing of verified complaint for total of ninety days.

Tennessee: Ten. Code Ann. § 53-11-451(c): proceedings must be instituted "promptly" following seizure no specific time for hearing.

Texas: Tex. Code Crim. Proc. Ann. art. 59.04(a): proceedings must be instituted within thirty days of seizure; no set time for hearing.

Utah: Utah Code Ann. §§ 58-37-13.7, 24-1-7.11, 24-1-4.3(a), 6(b): government must file proceedings within

sixty days of seizure and proceedings should be "expedited"; property owner can apply for interim "hardship" release with decision on that motion due within twenty days of motion or ten days of service.

Vermont: Vt. Stat. Ann. tit. 18 §§ 4242(c), 4243(a), 4244(a): after seizure government must apply "forthwith" in ex parte hearing for probable cause determination; petition must be filed fourteen days after that followed up to thirty days later with hearing.

Virginia: Va. Code. Ann. §§ 19.2-386.3A, 19.2-386.10: proceedings must be instituted within ninety days of seizure, and court "shall proceed to trial" upon appearance by claimant.

Washington: Wash. Rev. Code § 69.50.505: seizure considered to begin forfeiture hearings; claimant with "reasonable opportunity to be heard" but no set time for hearing.

Wisconsin: Wis. Stat. § 961.555(2): proceedings must be instituted within thirty days of seizure and hearing must be set within sixty days of the answer for total of ninety days.

Wyoming: Wyo. Stat. Ann. § 35-7-1049(c): proceedings must be instituted "promptly" following seizure, with no specified date for hearing.

AMICUS CURIAE BRIEF

No. 08-351

In The
Supreme Court of the United States

ANITA ALVAREZ,
State's Attorney of Cook County, Illinois,

Petitioner,

v.

CHERMANE SMITH, EDMANUEL PEREZ, TYHESHA BRUNSTON, MICHELLE WALDO, KIRK YUNKER, and TONY WILLIAMS,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF THE INSTITUTE FOR JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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Bennis v. Michigan, 516 U.S. 442 (1996) 1

Boyd v. United States, 116 U.S. 616 (1886) 28

Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974) 5, 9, 10, 11

Comm'r of Internal Revenue v. Shapiro, 424 U.S. 614 (1976) 31, 32

Connecticut v. Doehr, 501 U.S. 1 (1991) 31

Dolan v. City of Tigard, 512 U.S. 374 (1994) 29

Entick v. Carrington, (1765) 95 Eng. Rep. 807 (K.B.) 28

Ford Motor Credit Co. v. N.Y. City Police Dep't, 503 F.3d 186 (2d Cir. 2007) 24

Fuentes v. Shevin, 407 U.S. 67 (1972) 9, 10, 11, 25, 37

Gerstein v. Pugh, 420 U.S. 103 (1975) 32

Goldberg v. Kelly, 397 U.S. 254 (1970) 32

Harmelin v. Michigan, 501 U.S. 957 (1991) 17

Jones v. Takaki, 38 F.3d 321 (7th Cir. 1994) 4

Krimstock v. Kelly, 306 F.3d 40 (2d Cir. 2002) 36, 37

Lynch v. Household Fin. Corp., 405 U.S. 538 (1972) 29

Marshall v. Jerrico, Inc., 446 U.S. 238 (1980) 25, 34, 35

Mathews v. Eldridge, 424 U.S. 319 (1976) 4, 26, 33

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N. Ga. Finishing v. Di-Chem, Inc., 419 U.S. 601 (1975) 32

Smith v. City of Chicago, 524 F.3d 834 (7th Cir. 2008) 30

Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969) 32

Tumey v. Ohio, 273 U.S. 510 (1927) 33

United States v. James Daniel Good Real Property, 510 U.S. 43 (1993) ..... *passim*

United States v. Von Neumann, 474 U.S. 242 (1986) 4

United States v. Watson, 423 U.S. 411 (1976) 32

U.S. Trust Co. v. New Jersey, 431 U.S. 1 (1977) 9

VanHorne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304 (C.C.D.Pa. 1795) 27

Ward v. Village of Monroeville, 409 U.S. 57 (1972) 33

Wolff v. McDonnell, 418 U.S. 539 (1974) 25

Young v. United States ex rel. Vuitton Et Fils S.A., 481 U.S. 787 (1987) 9

CONSTITUTIONAL PROVISIONS

CONTRACTS CLAUSE, U.S. CONST. Art. I, § 10, cl. 1 9

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FOURTEENTH AMENDMENT, U.S. CONST. amend. XIV ..... *passim*

NEB. CONST. art. VII, § 5(2) 14

STATUTES AND CODES

1866 Civil Rights Act, 14 Stat. 27 (1866) 29

28 U.S.C. § 524(c)(1)(F)(i) (2009) 13

§ 524(c)(1)(I) (2009) 13

29 U.S.C. § 216(c) 34

Civil Asset Forfeiture Reform Act, Pub. L. No. 106-185, 114 Stat. 202 (2000) 13

Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 12

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Illinois Cannabis Control Act, 720 ILL. COMP. STAT. 550/5.1 15

Illinois Controlled Substances Act, Ill. Pub. Act 77-757 (1971) (codified at 720 ILL. COMP. STAT. 570/100) 15

720 ILL. COMP. STAT. 570/505(g)(1) 16, 35

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720 ILL. COMP. STAT. 570/505(g)(2)(i) 16

Illinois Drug Asset Forfeiture Procedures Act ("DAFPA"), Ill. Pub. Act 86-1382 (1990) (codified at 725 ILL. COMP. STAT. 150/1) ..... *passim*

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Ill. Pub. Act 86-1382 at § 16 16

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725 ILL. COMP. STAT. 150/5 2

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725 ILL. COMP. STAT. 150/9 3

Psychotropic Substances Act of 1978, Pub. L. No. 95-633, § 301, 92 Stat. 3768 12

OTHER AUTHORITIES

CONG. GLOBE, 42d Cong., 1st Sess. 499 (1871) 29

OTHER PUBLICATIONS

John Adams, Defence of the Constitutions of Government of the United States (1787), in 6 THE WORKS OF JOHN ADAMS 8 (Charles Francis Adams ed., 1856) 28

Katherine Baicker & Mireille Jacobson, *Finders Keepers: Forfeiture Laws, Policing Incentives, and Local Budgets*, 91 J. PUB. ECON. 2113 (2007) 20

TABLE OF AUTHORITIES – Continued

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Steve Berry, *Vogel Faces Bias Suit Over Cash Seizures*, ORLANDO SENTINEL, June 18, 1993, at B1 23

Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35 (1998) 22

Donald J. Boudreaux & A.C. Pritchard, *Civil Forfeiture and the War on Drugs: Lessons from Economics and History*, 33 SAN DIEGO L. REV. 91 (1996) 21

Jeff Brazil & Steve Berry, *Tainted Cash or Easy Money?*, ORLANDO SENTINEL, June 14, 1992, at A1 23

JAMES BUCHANAN, CONSTITUTIONAL ECONOMICS (1991) 7

JAMES BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT (1962) 7

BUREAU OF JUSTICE STATISTICS, LAW ENFORCEMENT MANAGEMENT AND ADMINISTRATIVE STATISTICS, 1997: DATA FOR INDIVIDUAL STATE AND LOCAL AGENCIES WITH 100 OR MORE OFFICERS (1999) 19

Press Release, Chi. Police Dep't, Chicago Committed to Reducing Violent Crime and Strengthening Community Partnerships in 2009 (Jan. 16, 2009) 35

Dick Cook, *Forfeiture System Debated*, CHATTANOOGA TIMES FREE PRESS, Feb. 17, 2006, at B1 25

TABLE OF AUTHORITIES – Continued

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JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS (3d ed. 2008) 28

EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS, U.S. DEP'T OF JUSTICE, 38 UNITED STATES ATTORNEYS' BULLETIN 180 (1990) 20

THE FEDERALIST NO. 51 (James Madison) 8

THE FEDERALIST NO. 54 (James Madison) 28

Mike Gangloff, *Seized Assets Fund Law Enforcement Efforts*, THE ROANOKE TIMES (VIRGINIA), Mar. 29, 2009, at A1 22

Patty Henetz, *Prosecutors, Police Reluctantly Comply With Asset Seizure Law*, THE ASSOCIATED PRESS STATE & LOCAL WIRE, July 17, 2003 15

HENRY HYDE, FORFEITING OUR PROPERTY RIGHTS 38 (1995) 22, 23

INSTITUTE FOR JUSTICE, POLICING FOR PROFIT (forthcoming 2009) 14

JUSTICE RESEARCH AND STATISTICS ASSOCIATION, MULTIJURISDICTIONAL DRUG CONTROL TASK FORCES: A FIVE-YEAR REVIEW 1988-1992 (1993) 19

Brent D. Mast, Bruce L. Benson & David W. Rasmussen, *Entrepreneurial Police and Drug Enforcement Policy*, 104 PUB. CHOICE 285 (2000) 21

TABLE OF AUTHORITIES – Continued

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J. Mitchell Miller & Lance H. Selva, *Drug Enforcement's Double-Edged Sword: An Assessment of Asset Forfeiture Programs*, 11 JUST. Q. 313 (1994) 21

Richard Miniter, *Ill-Gotten Gains*, 25 REASON 32 (Aug./Sept. 1993) 17, 22

WILLIAM NISKANEN, BUREAUCRACY AND REPRESENTATIVE GOVERNMENT (1st Paperback Print ed. 2007) (1971) 7

ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (Robert Maynard Hutchins ed., Encyclopedia Britannica 1952) (1776) 7

1 DAVID B. SMITH, PROSECUTION AND DEFENSE OF FORFEITURE CASES (2008) 15

Patrick Strawbridge, *Police Oppose Drug-Cash Plan*, THE OMAHA WORLD-HERALD, May 1, 1999, at 57 14

U.S. DEP'T OF JUSTICE, ASSET FORFEITURE FACT SHEET (1993) 18

U.S. DEP'T OF JUSTICE, ASSETS FORFEITURE FUND AND SEIZED ASSET DEPOSIT FUND ANNUAL FINANCIAL STATEMENT FISCAL YEAR 2008, REP. NO. 09-19 (2009) 18

Howard Witt, *Highway Robbery? Texas Police Seize Black Motorists' Cash, Cars*, CHI. TRIB., March 10, 2009, http://www.chicagotribune.com/news/nationworld/chi-texas-profiling_wittmar10,0,6051682.story 23, 24

TABLE OF AUTHORITIES – Continued

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John L. Worrall, *Addicted to the Drug War: The Role of Civil Asset Forfeiture as a Budgetary Necessity in Contemporary Law Enforcement*, 29 J. CRIM. JUST. 171 (2001) 20

INTEREST OF THE *AMICUS CURIAE*[1]

The Institute for Justice ("IJ") is a nonprofit, public-interest law center committed to defending the essential foundations of a free society and securing the constitutional protections necessary to ensure individual liberty. A central pillar of IJ's mission is to protect property rights, both because an individual's control over his own property is a tenet of personal liberty and because property rights are inextricably linked to all other civil rights. The aggressive use of civil forfeiture by governmental organizations poses a grave threat to those rights. It is for this reason that IJ participated as *amicus curiae* in both *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993) and *Bennis v. Michigan*, 516 U.S. 442 (1996). The strong pecuniary interest that law-enforcement agencies have in maximizing forfeiture proceeds has both distorted police and prosecutorial practices and, in some cases, led to seizures that lack probable cause. IJ therefore has an interest in the development of a rule of law that recognizes the importance of private property in our constitutional scheme and helps to curb those abuses.

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[1] This brief is filed pursuant to the written blanket consents on file with this Court. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus* or its counsel, make a monetary contribution intended to fund the preparation or submission of this brief.

STATEMENT

I. The Illinois Drug Asset Forfeiture Procedures Act

Illinois, like many other states, authorizes government officials to seek the forfeiture of personal and real property related to a drug violation. The Illinois Drug Asset Forfeiture Procedures Act ("DAFPA") governs the process under which drug forfeitures take place. 725 ILL. COMP. STAT. 150/1.

Under DAFPA, law-enforcement officers may seize personal property they believe was involved in a drug crime. These seizures often take place without the officer first securing a warrant and are based solely on the officer's suspicion that the property in some way helped to facilitate a crime. The law-enforcement agency must thereafter notify the State's Attorney of the seizure within 52 days, along with the circumstances surrounding the seizure and the estimated value of the seized property. 725 ILL. COMP. STAT. 150/5. What happens next depends on the nature and value of the seized property. If the seized property has an estimated value of greater than $20,000, or if it is real property, then the State's Attorney must institute judicial-forfeiture proceedings within 45 days of receiving notice. 725 ILL. COMP. STAT. 150/6. If the seized property is personal property with an estimated value of less than $20,000, though, then the State's Attorney must give persons with an interest in the property notice of the pending forfeiture within 45 days. The owner then

has another 45 days to file a verified claim to the property with the State's Attorney. If the owner files a claim and posts a bond, the State's Attorney must file judicial-forfeiture proceedings within 45 days. *Id.*

Thus, the amount of time that can pass between the time of seizure and the filing of judicial forfeiture proceedings depends largely on the nature of the property. For property worth more than $20,000, up to 97 days can elapse under DAFPA between the seizure of the property and the filing of judicial forfeiture proceedings. For property worth less than $20,000, it could be as much as 187 days, although an owner may reduce that time to 142 days by immediately filing a verified claim.

Even after the state files a forfeiture proceeding, there is still a delay before an owner can get his day in court. Once the state files a verified forfeiture complaint, the property owner has 45 days to file an answer. Once that answer is filed, a hearing is supposed to take place within 60 days—that is, unless the court delays the proceeding on a showing of good cause. 725 ILL. COMP. STAT. 150/9. The net effect is that resolution of a forfeiture proceeding can take months, if not years, and during that time the owner of the seized property is denied its use. DAFPA provides the property owner with no way to test the validity of the initial warrantless seizure or the property's continued detention for the duration of the proceedings.

II. The Proceedings Below

On November 22, 2006, Respondent property owners brought a class action lawsuit against the city of Chicago, its police superintendent, and the State's Attorney of Cook County, Illinois. J.A. 29a. In that complaint, Respondents alleged that the Chicago Police Department had seized their personal property and that, because DAFPA does not provide for a prompt preliminary post-seizure hearing, they had been deprived of their property for months with no way to seek its return. J.A. 30a-35a. They asked the district court to declare that the Due Process clause requires a prompt preliminary post-seizure hearing where the state must demonstrate probable cause to continue detaining the property for the duration of the proceedings. J.A. 36a.

The district court soon thereafter dismissed the complaint on the basis that twelve years earlier, the United States Court of Appeals for the Seventh Circuit, in *Jones v. Takaki*, had interpreted *United States v. Von Neumann*, 474 U.S. 242 (1986) to hold that "the Constitution does not require any procedure prior to the actual forfeiture proceeding." 38 F.3d 321, 324 (7th Cir. 1994). But on appeal, the Seventh Circuit in this case reversed the district court, overturned its prior holding in *Jones*, and held that a preliminary post-seizure/pre-forfeiture hearing was constitutionally required under the three-part test laid out in *Mathews v. Eldridge*, 424 U.S. 319 (1976).

SUMMARY OF ARGUMENT

Private-property rights form the foundation of a free society. The right to acquire and possess property is not only a natural consequence of human liberty, but is one of the primary foundations of our constitutional republic.

Civil-forfeiture laws represent one of the most serious assaults on private-property rights in the nation today. In *Calero-Toledo v. Pearson Yacht Leasing Co.*, this Court said that Due Process required no pre-seizure hearing for personal property in part because the government officials in charge of seizures generally did not have a pecuniary motive to their actions. 416 U.S. 663, 679 (1974). Since forfeiture proceeds went into general treasury funds, law enforcement had little reason to seize in an attempt to fill their agencies' coffers.

But subsequent changes in how civil-forfeiture statutes distribute forfeiture proceeds have fundamentally changed the incentives facing law-enforcement agencies. Amendments to both state and federal forfeiture laws after *Calero-Toledo* let law-enforcement agencies keep the proceeds from property forfeitures. In Cook County, Illinois, for instance, the seizing law-enforcement agency is entitled to 65% of all forfeiture proceeds while the Office of the State's Attorney receives another 25%.

This change in incentives has led to an explosion in civil-forfeiture activity, as law-enforcement agencies seek to seize as much as possible. Often, those

incentives have led to abuses where law-enforcement agencies seize and forfeit property with little or no connection to crime. Part of the reason for these strong-arm tactics is that, because of the cost, difficulty, and amount of time that it takes to successfully challenge the seizure of one's property, many innocent property owners fail to challenge the seizure or instead settle with law enforcement. In far too many cases the government will end up seizing and retaining property to which it has no right.

The unchecked discretion that seizing agencies have too long enjoyed is an affront to the protections that the Constitution affords to private-property rights. To guard against such abuses, the Due Process clause mandates judicial review of the seizure decisions. While pre-seizure hearings for personal property may be impractical in some instances, those difficulties evaporate as soon as the property is in the government's hands. At that time, the strong respect for individual property rights should require that courts promptly review whether the government had a valid basis for seizing the property in the first place.

ARGUMENT

I. Public Officials, Like Private Citizens, Are Self-Interested Actors

Self-interest is a universal human attribute. All people work to better their position or condition. The purpose of the law, through prohibitions on the use of

force and fraud, is to channel individual self-interest to productive ends. The result is that, in the private sphere of human activity, individuals must bargain with one another. By directing individuals to appeal to others' self-interest, the law limits the range of possible transactions to those that benefit both parties. More than two centuries ago, Adam Smith best explained what drives this broad cooperation:

> It is not from the benevolence of the butcher, the brewer or the baker, that we expect our dinner, but from their regard to their own self interest. We address ourselves, not to their humanity but to their self-love, and never talk to them of our own necessities but of their advantages.[2]

But just as private citizens are motivated by self-interest, so too does it motivate government officials.[3] Whereas the private citizen might seek more wealth, government officials might seek out a larger budget, increased benefits and prestige, and more power to pursue their preferred policy agenda.[4] The difference between the public and private spheres, however, is

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[2] ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 7 (Robert Maynard Hutchins ed., Encyclopedia Britannica 1952) (1776).

[3] JAMES BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT (1962) (discussing the universality of the self-interest axiom and its implications for public policy decision-making); *see also* JAMES BUCHANAN, CONSTITUTIONAL ECONOMICS 37-38 (1991).

[4] WILLIAM NISKANEN, BUREAUCRACY AND REPRESENTATIVE GOVERNMENT 38 (1st Paperback Print ed. 2007) (1971).

that where the private citizen must *persuade* to achieve his ends, the government official can employ force. It is therefore a constant threat that those in positions of power will use that force to serve their own self-interest at the expense of the broader populace. This concern reaches its zenith when government officials stand to benefit themselves or their agencies by seizing individuals' private property.

The Framers recognized this natural proclivity and drafted the Constitution to act as an institutional restraint on government action:

> If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. . . . A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.[5]

It is because governmental actors can use coercion in pursuit of their self-interest that the Framers constrained their actions through clearly defined and strictly enforced constitutional rules. The constitutional requirement of due process is one of those rules, an "auxiliary precaution" that mandates that government actions be accompanied by certain procedural safeguards so as to protect individuals from unwarranted overreaching.

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[5] THE FEDERALIST NO. 51 (James Madison).

This Court has also recognized that the Constitution carefully guards against self-interested government action. For instance, in *Young v. United States ex rel. Vuitton Et Fils S.A.*, this Court concluded that prosecution by a private attorney whose client has a financial interest in the matter was improper because it "creates an appearance of impropriety that diminishes faith in the fairness of the criminal justice system in general."[6] And while a state's impairment of its contract with a private party may be constitutional under the Contracts Clause if it is reasonable and necessary, this Court said that "complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake."[7]

Unfortunately, however, this Court's modern civil-forfeiture jurisprudence has failed to account for the self-interest that motivates both private and public actors alike. In *Calero-Toledo* this Court held, in part, that Puerto Rican authorities were not constitutionally required to provide notice and a hearing before seizing a yacht for forfeiture.[8] In so doing, this Court distinguished its earlier ruling in *Fuentes v. Shevin*, where it held that due process required that a private party, before repossessing goods, must give notice and the opportunity for a

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[6] 481 U.S. 787, 811 (1987).

[7] *U.S. Trust Co. v. New Jersey*, 431 U.S. 1, 26 (1977).

[8] 416 U.S. 663 (1974).

hearing." The *Calero-Toledo* Court reasoned that Puerto Rico did not have to provide any prior notice or hearing because "unlike the situation in *Fuentes*, seizure is not initiated by self-interested private parties; rather, Commonwealth officials determine whether seizure is appropriate under the provisions of the Puerto Rican statutes."[10]

But as the Founders recognized and public-choice theory demonstrates, the government official is just as self-interested as the private party. There was no difference in character that distinguished the private repossesser in *Fuentes* from the government official in *Calero-Toledo*, but a difference in the incentives that each faced. The private parties in *Fuentes*, creditors to conditional sales contracts, had a direct pecuniary interest in applying for writs of replevin even when not entitled to the items. After all, the creditor could calculate that, in some instances, the debtor would not contest the seizure, leaving the creditor with a windfall. Conversely, the Puerto Rican officials in *Calero-Toledo* had no similar motivations. Any property that the officials seized, if ultimately forfeited, would be remitted to the Commonwealth. Since the officials would not share in any proceeds, they had no incentive to seize items indiscriminately.

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[9] 407 U.S. 67 (1972).

[10] 416 U.S. at 479.

That neutral decisionmaking no longer exists. As discussed below, changes in the law since *Calero-Toledo* have given law-enforcement officials a pecuniary interest in civil-forfeiture proceeds that rivals the incentives that the private actors in *Fuentes* faced. The Court's jurisprudence needs to reflect that fundamental change. One measure to help curb the threat of executive overreach is a prompt judicial check in the form of a preliminary post-seizure hearing.

II. The Changing Landscape of Civil Forfeitures and Its Consequences

A seismic shift in civil forfeiture has occurred in recent years. Beginning in the early 1980's, federal and state governments began to let law-enforcement agencies keep a percentage of the forfeiture proceeds that they had seized. In so doing, the legislature created a powerful incentive in law enforcement to maximize their seizure of forfeitable assets. Not surprisingly, the amount of forfeiture activity has exploded as a result. But in so doing, the federal and state forfeiture systems have distorted police and prosecutor priorities, created agencies whose funding from outside the legislative process leaves them with little accountability, and led to systematic abuses.

A. The Shift in Law-Enforcement Incentives

For most of American history, the proceeds from forfeitures went not to the law-enforcement agencies

responsible for the seizures, but to the government's general fund. While the federal government made limited use of civil forfeiture during Prohibition, its first use in combating the trade in illegal drugs came as part of the Comprehensive Drug Abuse and Prevention Act of 1970.[11] The Act authorized federal officials to seize and seek the civil forfeiture of drugs, the equipment and raw materials used to make them, and the conveyances that were used to transport them.[12] But once the property had been forfeited, the Attorney General had to deposit any net proceeds into the Treasury's general fund.[13]

The radical change in federal law-enforcement incentives took place in 1984 when Congress amended portions of the Comprehensive Drug Abuse and Prevention Act.[14] Those amendments created the Assets Forfeiture Fund into which the Attorney General was to deposit all net forfeiture proceeds for use by the Department of Justice and other federal law-enforcement agencies. Originally the statute allowed the government to use Fund proceeds for a relatively limited number of purposes, such as paying for forfeiture expenses, giving awards for information

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[11] Pub. L. No. 91-513, 84 Stat. 1236.

[12] § 511, 84 Stat. at 1277.

[13] Psychotropic Substances Act of 1978, Pub. L. No. 95-633, § 301, 92 Stat. 3768, 3778.

[14] Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837.

that led to forfeitures, and paying for remissions or mitigations.[15] Furthermore, the 1984 amendments said that any forfeiture proceeds exceeding $5 million that were left in the Fund at the end of the fiscal year were to be deposited in the Treasury's general fund.[16] But subsequent amendments both eliminated the $5 million cap and dramatically broadened the scope of what expenses the government could pay for with forfeited funds.[17] The net effect is that, after the 1984 amendments, federal agencies were able to retain and spend forfeiture proceeds—subject only to very loose restrictions—that they would have had to turn over to the Treasury previously.[18]

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[15] § 310, 98 Stat. at 2052.

[16] § 310, 98 Stat. at 2053.

[17] Some of these expenses included "equipping for law enforcement functions any Government-owned or leased vessel, vehicle, or aircraft" and paying the "overtime salaries, travel, fuel, training, equipment, and other similar costs of State or local law enforcement officers that are incurred in a joint law enforcement operation with a Federal law enforcement agency . . . participating in the Fund." 28 U.S.C. §§ 524(c)(1)(F)(i), (c)(1)(I) (2009).

[18] In 2000, the Civil Asset Forfeiture Reform Act amended various provisions of federal forfeiture law. Pub. L. No. 106-185, 114 Stat. 202 (2000). The Act, among other things, shifted the burden of proof in a forfeiture hearing from the claimant to the government, eliminated the requirement that claimants post a cost bond before being able to contest a civil forfeiture in court, and provided representation for indigent claimants under certain circumstances. It did not, however, change how forfeiture proceeds are distributed or otherwise ameliorate the pecuniary interest law-enforcement agencies have in civil forfeitures.

Many states have followed suit by amending their civil-forfeiture laws to give law-enforcement agencies a direct share of forfeited proceeds. At last count, law-enforcement agencies in forty-one states receive some or all of the civil-forfeiture proceeds they seize.[19] And agencies can be very protective of their position. In Nebraska, for instance, the state constitution requires that half of the moneys collected from state forfeiture proceedings go to schools.[20] To avoid sharing, law-enforcement agencies instead asked federal prosecutors to "adopt" their seizures. By forfeiting under federal law, the agency could keep 80% of the proceeds, the federal government would retain the other 20%, and the schools would get nothing. Not surprisingly, when a state senator introduced an amendment to require that those funds also be shared with schools, both state and federal law-enforcement officials fought tooth and nail against it.[21]

The reluctance to share forfeiture proceeds has even led to illegality. In November 2000, Utahns passed Initiative B, which required forfeiture proceeds to be deposited into the state's Uniform School Trust Fund. But prosecutors in three counties ignored the law and diverted nearly a quarter of a

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[19] INSTITUTE FOR JUSTICE, POLICING FOR PROFIT (forthcoming 2009).

[20] NEB. CONST. art. VII, § 5(2).

[21] Patrick Strawbridge, *Police Oppose Drug-Cash Plan*, THE OMAHA WORLD-HERALD, May 1, 1999, at 57.

million dollars into their own accounts. It was only after the threat of a lawsuit that the prosecutors capitulated.[20] The police and prosecutors later persuaded the legislature to nullify the voter-approved initiative so that all forfeiture proceeds were again directed to law enforcement.

Like the federal government and other states, Illinois has amended its forfeiture laws to give state and local law enforcement the lion's share of any seized and forfeited property. The Illinois legislature in 1971 passed the Illinois Controlled Substances Act,[21] which permitted state law enforcement to seize property that was substantially similar to the types of property that federal officials could seize under the Comprehensive Drug Abuse and Prevention Act of 1970. Under the Illinois Controlled Substances Act, all proceeds from the sale of the forfeited property, minus the expenses incurred in the seizure, maintenance of custody, and forfeiture and sale of the property, were to be transmitted to the State of Illinois.[24] Illinois

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[20] Patty Henetz, *Prosecutors, Police Reluctantly Comply With Asset Seizure Law*, THE ASSOCIATED PRESS STATE & LOCAL WIRE, July 17, 2003; *see also* 1 DAVID B. SMITH, PROSECUTION AND DEFENSE OF FORFEITURE CASES ¶ 7.02(2) (2008) (discussing conspiracy between Missouri law enforcement and DEA to thwart state law requiring judicial approval before federal government may adopt a state forfeiture case).

[21] Ill. Pub. Act 77-757 (1971) (codified at 720 ILL. COMP. STAT. 570/100).

[24] Before the passage of DAFPA, the other major Illinois anti-drug statute, the Illinois Cannabis Control Act, 720 ILL.

(Continued on following page)

amended a number of controlled-substance laws in 1990 through the passage of the Drug Asset Forfeiture Procedures Act ("DAFPA").[25] DAFPA harmonized forfeiture across Illinois' various anti-drug statutes by deleting the previous requirement that all net forfeiture proceeds be remitted to the state. Instead, DAFPA mandated that the Director sell all forfeited property—other than contraband and what was transferred to the enforcement agency for its enforcement efforts—and turn over ninety percent of the proceeds to law enforcement: Sixty-five percent to the police agencies that "conducted or participated in the investigation resulting in the forfeiture,"[26] and twenty-five percent to the Office of the State's Attorney.[27] Pursuant to DAFPA, forfeited proceeds shall be used for "the enforcement of laws governing cannabis and controlled substances."[28]

COMP. STAT. 550/5.1, also required Illinois officials to send all net forfeiture proceeds to the state general fund.

[25] Ill. Pub. Act 86-1382 (1990) (codified at 725 ILL. COMP. STAT. 150/1).

[26] Ill. Pub. Act 86-1382 at § 16.

[27] For counties with populations of less than three million, this money is split between the Office of the State's Attorney that instituted the forfeiture and the Office of the State's Attorneys Appellate Prosecutor. 720 ILL. COMP. STAT. 570/505(g)(2)(i).

[28] 720 ILL. COMP. STAT. 570/505(g)(1), (2)(i).

B. Law-Enforcement Retention of Civil-Forfeiture Proceeds Has Led to "Policing for Profit"

> As we have recognized in the context of other constitutional provisions, it makes sense to scrutinize governmental action more closely when the State stands to benefit.[29]

As one might expect, the new incentives facing law enforcement in the wake of changes to federal and state drug laws have led to an explosion of forfeiture activity. But in spurring this meteoric rise in asset seizures, these laws have created agencies that too often are more committed to securing forfeiture revenues than the fair and impartial administration of justice. As the former chief of the Asset Forfeiture and Money Laundering Offices stated, "we had a situation in which the desire to deposit money into the asset forfeiture fund became the reason for being of forfeiture, eclipsing in certain measure the desire to effect fair enforcement of the laws."[30] In addition to distorting police priorities, the change in incentives has also led to the kind of repeated abuses that demonstrate the need for judicial scrutiny.

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[29] *Harmelin v. Michigan*, 501 U.S. 957, 978 n.9 (1991) (Scalia, J.)

[30] Richard Miniter, *Ill-Gotten Gains*, 25 REASON 32, 34 (Aug./Sept. 1993) (quoting Michael F. Zeldin, former Chief, Department of Justice Asset Forfeiture & Money Laundering Offices).

One consequence of the changes in the federal and state forfeiture laws is the dramatic increase of forfeiture activity that took place in their wake. At the federal level, proceeds in the Department of Justice Assets Forfeiture Fund, which amounted to only $27 million in 1985, swelled almost twentyfold to $556 million by 1993.[31] Since that time, the total amount of civil forfeiture has only continued to increase. By fiscal year 2008, the federal Assets Forfeiture Fund and Seized Asset Deposit Fund together held more than $3.1 billion.[32]

Mirroring the federal experience, the amount of civil forfeiture activity within Illinois has grown dramatically since DAFPA was adopted in 1991. In a survey called the Law Enforcement Management and Administrative Statistics (LEMAS), the Department of Justice asks state and local law-enforcement agencies about the revenue they receive from state-level civil-forfeiture proceedings. In 1993, the first LEMAS survey conducted after DAFPA's passage reported that Illinois law-enforcement agencies had collected $6.9 million in proceeds from state and local civil-forfeiture actions. In a mere four years, that

[31] U.S. Dep't of Justice, Asset Forfeiture Fact Sheet (1993).

[32] U.S. Dep't of Justice, Assets Forfeiture Fund and Seized Asset Deposit Fund Annual Financial Statement Fiscal Year 2008, Rep. No. 09-19 at 6 (2009).

number had grown by over 400 percent to over $33 million.[33]

As state and federal law gave law-enforcement agencies permission to retain a sizable percentage of what they seized, the money flowing into their coffers from asset forfeiture continued to grow. Some state and local legislatures, reacting to this new revenue stream, have reduced appropriations to law enforcement by the amount of expected civil forfeitures to free up money for other programs.[34] For law-enforcement agencies whose budgets have been cut,

[33] BUREAU OF JUSTICE STATISTICS, LAW ENFORCEMENT MANAGEMENT AND ADMINISTRATIVE STATISTICS, 1997: DATA FOR INDIVIDUAL STATE AND LOCAL AGENCIES WITH 100 OR MORE OFFICERS (1999).

[34] Replacing appropriations with asset-forfeiture proceeds also subverts legislative oversight. It is through appropriating money that the legislature can exercise a degree of control over agency action. If an agency is performing poorly or focusing on the wrong law-enforcement priorities, the legislature can punish it through reduced expenditures. Having a large percentage of an agency's budget come from forfeiture proceeds—a funding stream that is immune to the legislative process—breaks this link. *See* JUSTICE RESEARCH AND STATISTICS ASSOCIATION, MULTIJURISDICTIONAL DRUG CONTROL TASK FORCES: A FIVE-YEAR REVIEW 1988-1992 at 9 (1993) ("Asset seizures play an important role in the operation of [multijurisdictional drug] task forces. One 'big bust' can provide a task force with the resources to become financially independent. Once financially independent, a task force can choose to operate without federal or state assistance.").

securing continued forfeiture proceeds has become a paramount law-enforcement objective.[35]

Not surprisingly, a substantial number of law-enforcement agencies are now dependent on civil-forfeiture proceeds and view civil forfeiture as a necessary source of income. In a survey of more than 1,400 law-enforcement executives, nearly 40% of police agencies reported that civil-forfeiture proceeds were a *necessary* budget supplement.[36] This dependency is also present at the federal level, where the Department of Justice in the past has urged its lawyers to increase their civil-forfeiture efforts so as to meet the Department's annual budget targets.[37] The resulting pressures have not only skewed agency decisions about what laws to enforce most vigorously, but they have also tilted law-enforcement practices in ways designed to maximize civil-forfeiture proceeds.

One consequence of giving law enforcement a pecuniary interest in forfeiture proceeds is that it can cause them to over-enforce crimes that carry the

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[35] *See* Katherine Baicker & Mireille Jacobson, *Finders Keepers: Forfeiture Laws, Policing Incentives, and Local Budgets*, 91 J. PUB. ECON. 2113 (2007).

[36] John L. Worrall, *Addicted to the Drug War: The Role of Civil Asset Forfeiture as a Budgetary Necessity in Contemporary Law Enforcement*, 29 J. CRIM. JUST. 171, 179 (2001).

[37] EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS, U.S. DEP'T OF JUSTICE, 38 UNITED STATES ATTORNEYS' BULLETIN 180 (1990) ("Every effort must be made to increase forfeiture income during the remaining three months of [fiscal year] 1990.").

possibility of forfeiture to the neglect of other law-enforcement objectives. This makes basic economic sense; as the return to enforcing certain laws increases, one would expect law-enforcement agencies to devote a higher percentage of their resources to those aims.[38] This is not simply theory: One study shows that in states where agencies get to keep the majority of forfeiture proceeds, drug arrests—which often have the potential of a related civil forfeiture—constitute a significantly higher percentage of all arrests.[39]

Furthermore, law enforcement's pecuniary interest skews not only which laws are enforced, but how they are enforced as well. Often times, agencies will enforce the law with an eye to maximizing forfeiture proceeds, even when that impedes other law-enforcement goals. One example is where a law-enforcement agency is made aware of drug activity but refrains from making any arrests until the dealer has sold most of his contraband.[40] While this tactic maximizes potential forfeiture proceeds, it means that most of the drugs remain on the street. Former New York City Police Commissioner Patrick Murphy

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[38] Donald J. Boudreaux & A.C. Pritchard, *Civil Forfeiture and the War on Drugs: Lessons from Economics and History*, 33 SAN DIEGO L. REV. 79, 91 (1996).

[39] Brent D. Mast, Bruce L. Benson & David W. Rasmussen, *Entrepreneurial Police and Drug Enforcement Policy*, 104 PUB. CHOICE 285 (2000).

[40] J. Mitchell Miller & Lance H. Selva, *Drug Enforcement's Double-Edged Sword: An Assessment of Asset Forfeiture Programs*, 11 JUST. Q. 313, 328 (1994).

was clear when he explained the city's motivation behind posting roadblocks on the southbound lanes of Interstate 95 heading into New York City to catch those coming to buy drugs:

> [Police have] a financial incentive to impose roadblocks on the southbound lanes of I-95, which carry the cash to make drug buys, rather than the northbound lanes, which carry the drugs. After all, seized cash will end up forfeited to the police department, while seized drugs can only be destroyed.[11]

The desperate desire for ever-greater forfeiture revenues also raises concerns that state and local law-enforcement officers may be tempted to seize property without probable cause.[12] And, indeed, police in a number of instances have seized peoples' property without any reason to suspect it was subject to forfeiture. In Volusia County, Florida, for instance, the sheriff created the Selective Enforcement Team, a "drug squad" that operated along the corridors of Interstate 95. Under the sheriff's directions, Selective Enforcement Team members were to view any motorist that had more than $100 in cash as a drug trafficker and seize his or her funds.[13] Other reasons

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[11] Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 68 (1998) (citing Richard Miniter, *Ill-Gotten Gains*, 25 REASON 32, 34 (Aug./Sept. 1993)).

[12] Mike Gangloff, *Seized Assets Fund Law Enforcement Efforts*, THE ROANOKE TIMES (VIRGINIA), Mar. 29, 2009, at A1.

[13] HENRY HYDE, FORFEITING OUR PROPERTY RIGHTS 38 (1995).

to seize a person's cash included having no luggage in the car, having too much luggage in the car, or carrying bills in $1, $5, $10, $20, $50 or $100 denominations.[14] Selena Washington passed through Volusia County on her way from Charleston, South Carolina, to Miami to buy building materials to repair her home, which had been severely damaged by Hurricane Hugo. Despite no evidence of any drug involvement whatsoever, the sheriff's department seized more than $19,000 from Ms. Washington and held her money for more than eight months. In the end, she settled for $15,000 after her attorney told her that the cost of continuing to fight would exceed the amount of money seized.[15]

A more recent, but equally troubling series of abuses occurred in Tenaha, Texas, a town near the Louisiana border. Over a two-year period, Tenaha police seized cash, jewelry, and cellular phones from more than 140 people—almost all of them African-Americans—who were not charged with any crime.[16] The police and the local district attorney offered these motorists an unpalatable choice: waive their rights to

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[14] Jeff Brazil & Steve Berry, *Tainted Cash or Easy Money?*, ORLANDO SENTINEL, June 14, 1992, at A1.

[15] Steve Berry, *Vogel Faces Bias Suit Over Cash Seizures*, ORLANDO SENTINEL, June 18, 1993, at B1; *see also* HYDE, *supra* note 43, at 40.

[16] Howard Witt, *Highway Robbery? Texas Police Seize Black Motorists' Cash, Cars*, CHI. TRIB., March 10, 2009, http://www.chicagotribune.com/news/nationworld/chi-texas-profiling_wittmar10,0,6051682.story.

contest the seizures or be charged for money laundering or other crimes. In one instance, an interracial couple had more than $6,000 seized, money they planned to use to buy a used car. The couple signed a waiver after police threatened to take away their children and turn them over to child protective services.[17]

These abuses arise because of the time, cost, and difficulty of challenging a seizure. For example, in Tennessee many months can elapse before a forfeiture hearing takes place. That kind of delay can be interminable for one deprived of needed funds or their only vehicle. For those in need of immediate relief, the best course may be to settle for a percentage of their property rather than to wait for their day in court. This is particularly true with depreciating assets like automobiles, where the vehicle continues to decline in value while it sits on the impound lot.[18] Illinois, which has similar delays between the time of the seizure and when the ultimate forfeiture proceeding takes place, is no different. According to the head of the Tennessee Department of Safety's Asset Forfeiture Division, only

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[17] *Id.*

[18] Prolonged detention in addition harms the interests of others with a financial interest in the vehicle, such as secured creditors. To protect that interest, at least one circuit has said that creditors must be given notice and an opportunity to be heard in any vehicle forfeiture action in which the creditors hold a valid security interest. *Ford Motor Credit Co. v. N.Y. City Police Dep't*, 503 F.3d 186 (2d Cir. 2007).

10% of all seizures end up going before a court.[49] This means that, in the vast majority of cases, law enforcement's seizure decisions never receive any independent scrutiny. Knowing that their actions will only rarely be reviewed, the current civil-forfeiture system provides no effective check on law-enforcement overreaching.

III. The Importance of Private Property, and the Grave Risk of Erroneous Deprivations Due to the Incentives Facing Law Enforcement, Require Effective Judicial Oversight of Seizure Decisions

One of the most basic tenets of constitutional law is that persons may not be deprived of life, liberty, or property without due process of law.[50] Requiring due process serves two purposes: to prevent unjustified or mistaken deprivations and to promote participation and dialogue by affected individuals in the decision-making process.[51] But a procedure can serve those ends only when it lets affected individuals participate at a meaningful time and in a meaningful manner.[52] DAFPA's failure to provide property owners with any

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[49] Dick Cook, *Forfeiture System Debated*, CHATTANOOGA TIMES FREE PRESS, Feb. 17, 2006, at B1.

[50] *See, e.g.*, *Wolff v. McDonnell*, 418 U.S. 539, 557-58 (1974).

[51] *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980).

[52] *Fuentes*, 407 U.S. at 80 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 551 (1965)).

preliminary post-seizure process whatsoever causes the Act to fail on both counts.

Mathews v. Eldridge provides the proper analytical framework by which to analyze the sufficiency of the process received by one who is deprived of a protected property or liberty interest.[50] Most notably, this Court employed the three-part *Mathews* framework in *United States v. James Daniel Good Real Property* when it held that the government must provide a property owner with notice and an opportunity to be heard before seizing real property.[51] The *Mathews* test looks to (1) "the private interest that will be affected by the official action;" (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards;" and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[52] Each of these factors mandates a prompt preliminary post-seizure hearing.

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[50] 424 U.S. 319 (1976).

[51] 510 U.S. 43, 53-62 (1993).

[52] 424 U.S. at 335.

A. The Right to Private Property, and the Irreparable Injury That Can Result From an Extended Deprivation, Mean the Private Interest Is Entitled to Great Weight

The private interest at stake in this case is of enormous magnitude. DAFPA permits the unilateral seizure of property with no judicial check for months, if not years. This is an affront to the strong tradition of private-property rights in this nation. Furthermore, the fact that the seizure of a conveyance or needed moneys can so often work an irreparable injury magnifies the private interest in a prompt judicial hearing.

The Chicago Police Department's warrantless seizures of Respondents' personal property have impinged on a fundamental individual right. Private-property rights form the foundation of a free society. The right to private property both pre-existed this nation and was one of the fundamental bases for its founding. Unlike Great Britain, where the traditional view held that all land belonged to the crown, the founding generation saw the right to property as one that individuals possessed in nature.[16] Consistent with that Lockean understanding, one of the primary reasons that people came together to establish

[16] *VanHorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 310 (C.C.D.Pa. 1795) ("[T]he right of acquiring and possessing property, and having it protected, is one of the natural, inherent, and unalienable rights of man.").

government was not to *create* the right to property, but to help *secure* it. As James Madison stated, "[g]overnment is instituted no less for protection of the property, than of the persons, of individuals."[57]

The Founders' zeal to protect private property against government encroachment was not simply born from a desire to create the potential for wealth and economic growth; instead, they correctly viewed strong private-property rights as the most effective bulwark against other usurpations of liberty.[58] They feared that once protections for property declined, all other personal freedoms would soon follow: "Property is surely a right of mankind as real as liberty. . . . The moment the idea is admitted into society that property is not sacred as the laws of God, and that there is not a force of law and public justice to protect it, anarchy and tyranny commence."[59]

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[57] THE FEDERALIST No. 54 (James Madison); *see also Boyd v. United States*, 116 U.S. 616, 627 (1886) ("The great end for which men entered into society was to secure their property.") (quoting Lord Camden, J. in *Entick v. Carrington*, (1765) 95 Eng. Rep. 807, 817-18 (K.B.)).

[58] JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS xi (3d ed. 2008) ("The founding generation stressed the significance of property ownership as a safeguard for political liberty against arbitrary government as well as the economic utility of private property.").

[59] John Adams, Defence of the Constitutions of Government of the United States (1787), in 6 THE WORKS OF JOHN ADAMS 8, 8-9 (Charles Francis Adams ed., 1856); *see also* ELY, *supra* note 58, at 28 (noting that the Founders, relying on the English Whig

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The strong respect accorded to property rights was in no way diminished by the passage of time. After the Civil War, those in Congress who attempted to protect the new freedmen understood that an individual's right to acquire, possess, and control property was of the utmost importance.[60] Statements following the passage of the Fourteenth Amendment also make clear that the right to private property was one of the chief rights the Amendment was enacted to protect.[61]

To this day, the strong respect for the sanctity of property lives on. In *Lynch v. Household Finance Corp.*, this Court said that "the dichotomy between personal liberties and property rights is a false one."[62] This Court has similarly rejected the idea that property rights "should be relegated to the status of a poor relation" to those protected by the First or Fourth Amendments.[63] And perhaps most forcefully,

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tradition, felt that the "protection of private property was crucial to the preservation of freedom").

[60] *E.g.* 1866 Civil Rights Act, 14 Stat. 27, 27 (1866) (counting among its purposes that all persons born in the United States, regardless of any previous condition of slavery, shall have the same right "to inherit, purchase, lease, sell, hold, and convey real and personal property . . . ").

[61] CONG. GLOBE, 42d Cong., 1st Sess. 499 (1871) (stating that "the right that private property shall not be taken without compensation is among those privileges" protected by the Fourteenth Amendment) (statement of Sen. Fredrick Frelinghuysen).

[62] 405 U.S. 538, 552 (1972).

[63] *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994).

this Court noted in *James Daniel Good* that "[i]ndividual freedom finds tangible expression in property rights."[64] Without property, there can be no liberty.

Beyond the strong interest that each citizen has in his or her property generally, the seizure of one's vehicle or money can cause great practical difficulties. The Seventh Circuit correctly noted that the loss of a vehicle can result in "missed doctor's appointments, missed school, and perhaps most significant of all, loss of employment."[65] Furthermore, a vehicle is a depreciating asset; it loses value over time. Therefore, when a seized vehicle is finally returned, it is almost assuredly worth less than when it was seized. The longer the detention, the greater the loss that the owner cannot recover. Likewise, the seizure of a substantial amount of cash can also cause serious hardships, regardless of what the resolution might be to the ultimate forfeiture proceeding. Recall Selena Washington, the woman discussed above who was travelling from South Carolina to buy building materials. The police seizure of her $19,000 severely impaired her ability to repair her hurricane-damaged home. Even though Ms. Washington ultimately got most of her money back, the damage had been done.

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[64] 510 U.S. at 61; *see also id.* at 81 (Thomas, J., concurring in part and dissenting in part) (stating that property rights "are central to our heritage").

[65] *Smith v. City of Chicago*, 524 F.3d 834, 838 (7th Cir. 2008).

Similarly, for those of modest means, the seizure of a substantial sum of cash can mean missed bills, damage to credit reports, and the cessation of needed utilities. It does not matter how the ultimate forfeiture proceeding is resolved; the prolonged detention itself works upon them an irreparable injury.

This Court has consistently held that where the deprivation of one's property or liberty would lead to irreparable harm, a pre-deprivation or prompt post-deprivation hearing is constitutionally necessary.[66] In *Commissioner of Internal Revenue v. Shapiro*, this Court stated that:

> [A]t least where irreparable injury may result from a deprivation of property pending final adjudication of the rights of the parties, the Due Process Clause requires that the party whose property is taken be given an opportunity for some kind of predeprivation or prompt post-deprivation hearing at which some showing of the probable validity of the deprivation must be made.[67]

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[66] *James Daniel Good*, 510 U.S. at 56 ("And even if the ultimate judicial decision is that the claimant was an innocent owner, or that the Government lacked probable cause, this determination, coming months after the seizure, 'would not cure the temporary deprivation that an earlier hearing might have prevented.'") (quoting *Connecticut v. Doehr*, 501 U.S. 1, 15 (1991)).

[67] 424 U.S. 614, 629 (1976).

While the deprivation in *Shapiro* was the summary seizure of funds that were needed to post bail, this Court in numerous other contexts has required immediate judicial oversight when a delay could lead to irreparable harm. One is that of an arrestee: this Court has said the state does not invariably need a prior judicial determination of probable cause before arresting someone.[68] But once an arrest does occur, the Constitution requires the state to justify the arrest at a prompt post-arrest hearing before a neutral magistrate.[69] Other examples where the threat of irreparable injury requires a preliminary adversarial hearing to establish the probable validity of the seizure include the temporary deprivation of wages,[70] the garnishing of a corporation's bank accounts,[71] and the temporary deprivation of welfare payments.[72] The seizure of one's vehicle or a substantial amount of cash poses the same threat of irreparable harm and is of no less constitutional significance. The same procedural protections that apply to deprivations in those contexts should apply here.

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[68] *See, e.g., United States v. Watson*, 423 U.S. 411, 417 (1976).

[69] *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975).

[70] *Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 341-42 (1969).

[71] *N. Ga. Finishing v. Di-Chem, Inc.*, 419 U.S. 601, 606 (1975).

[72] *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970).

B. The Incentives Facing Law Enforcement Pose a Grave Risk of Erroneous Deprivations That a Preliminary Post-Seizure Hearing Will Alleviate

The second *Mathews* factor considers the risk of an erroneous deprivation given current procedures, as well as the probable value of any additional procedural safeguards. The pecuniary interest that accompanies the current system of distributing forfeiture proceeds, where both federal and Illinois law-enforcement agencies "eat what they kill," should give this Court pause. As discussed above, these incentives create too great a risk of erroneous deprivations and have, in fact, too often led to seizures lacking in probable cause. A prompt post-seizure hearing will help to curb law enforcement's worst instincts and cut the risk of erroneous property deprivations.

Giving closer scrutiny to the actions of public officials and agencies when they have a direct financial stake in the outcome of proceedings is nothing new for this Court. In *Tumey v. Ohio*, this Court overturned a fine where the mayor also sat as a judge and personally received a share of the proceeds.[73] Nor is it just the prospect of personal gain that creates concern. This Court in *Ward v. Village of Monroeville* held that having the mayor sit as a judge where a substantial portion of the town's revenues

[73] 273 U.S. 510 (1927).

came from fines violated due process.[74] Likewise, this Court in both *Marshall* and *James Daniel Good* noted the constitutional concerns that arise when an agency's decisions are clouded by a pecuniary motive.[75] The general principle throughout this line of cases is straightforward: when government officials have an incentive to act for self-interested reasons, the courts must stand guard against unwarranted and erroneous deprivations.

The changes that DAFPA made in Illinois forfeiture law gave both the Chicago Police Department and the State's Attorney Office for Cook County compelling financial reasons to seize property. For each dollar seized and forfeited, these two agencies receive 90 cents; this is the sort of direct, substantial, and unlimited pecuniary reward that gives rise to grave due-process concerns. First, unlike the civil penalties in *Marshall*, the forfeiture funds at issue here do not merely reimburse the police and prosecutor for the costs of seizing and bringing forfeiture proceedings.[76] Instead, Illinois law lets the police and prosecutors use the forfeited money for

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[74] 409 U.S. 57 (1972).

[75] 446 U.S. at 250 (constitutional concerns raised when government official's "judgment will be distorted by the prospect of institutional gain as a result of zealous enforcement efforts"); 510 U.S. at 55-56 (constitutional considerations arise where "the Government has a direct pecuniary interest in the outcome of the proceeding").

[76] *Cf. Marshall*, 446 U.S. at 245 (citing 29 U.S.C. § 216(e)).

almost anything so long as it is tangentially related to "the enforcement of laws governing cannabis and controlled substances."[77] Second, the more property the Chicago Police and State's Attorney seize, the more proceeds they receive. This is starkly different than the civil penalties in *Marshall*, which had "never been allotted to the regional offices on the basis of the total amount of penalties collected by particular offices."[78] And lastly, the Chicago Police Department received $13.5 million in forfeiture proceeds in 2008,[79] an amount that vastly exceeds the civil penalties in *Marshall*.[80] In sum, the pecuniary interest that civil forfeiture places on the Chicago Police Department and State's Attorney dwarfs the incentives that the assistant regional administrators faced in *Marshall* and demonstrates the need for prompt judicial oversight.

The Illinois DAFPA, however, curtails the courts' ability to curb possible abuses. Because the statute does not provide for a prompt post-seizure preliminary hearing, the first time that any judicial scrutiny of Illinois officials' seizure decisions occurs is months,

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[77] 720 ILL. COMP. STAT. 570/505(g)(1).

[78] 446 U.S. at 246.

[79] Press Release, Chi. Police Dep't, Chicago Committed to Reducing Violent Crime and Strengthening Community Partnerships in 2009 (Jan. 16, 2009), *available at* http://www.chicagopolice.org/MailingList/PressAttachment/2008crimestats.pdf.

[80] 446 U.S. at 245.

if not years, after the fact. In the interim, many meritorious claims will fall to the wayside because of the delay and cost involved in waiting for the ultimate forfeiture proceeding. Rather than put the government to its burden, owners often will decide to drop their challenges altogether or to settle with the government for pennies on the dollar. Delaying consideration of whether there was probable cause for the initial seizure until the ultimate proceeding, as the Second Circuit has recognized, is insufficient to mitigate the risk of erroneous seizures.[86]

Indeed, the threat of unwarranted deprivations is of even more pressing concern in this case than in *James Daniel Good*. Under the statute that permitted the seizure of real property in *James Daniel Good*, law enforcement first had to secure a warrant of seizure from a magistrate judge.[87] While the proceeding was *ex parte*, and only the government was able to present evidence, law enforcement still had to justify its intended actions to a neutral judicial

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[86] *Krimstock v. Kelly*, 306 F.3d 40, 50-51 (2d Cir. 2002) ("Some risk of erroneous seizure exists in all cases, and in the absence of prompt review by a neutral fact-finder, we are left with grave Fourth Amendment concerns as to the adequacy of an inquiry into probable cause that must wait months or sometimes years before a civil forfeiture proceeding takes place. Our concerns are heightened by the fact that the seizing authority in this case 'has a direct pecuniary interest in the outcome of the proceeding.'") (quoting *James Daniel Good*, 510 U.S. at 55-56).

[87] 510 U.S. at 55.

official. Under Illinois law, however, law enforcement can seize both cash and conveyances without first securing any warrant. In that regime, the judiciary makes no appearance until months or years later when the ultimate forfeiture proceeding gets underway.

C. The Governmental Interest Is Minimal

In contrast to the direct and immediate benefits that a preliminary post-seizure hearing would afford to those whose property has been seized by the government, Illinois' interest in not providing a hearing amounts to little more than avoiding the minimal burden that a hearing would impose. There is no question that a preliminary proceeding would have some cost. But all efforts at due process involve some expenses; were administrative burdens a reason alone to curtail judicial proceedings, the protections afforded one deprived of a protected property or liberty interest would be few indeed.[30]

Nor is a preliminary post-seizure hearing the administrative nightmare that Petitioner and her *amici* suggest. For several years, New York courts have held so-called *Krimstock* hearings, prompt

[30] *Fuentes*, 407 U.S. at 91 n.22 ("A . . . hearing always imposes some costs in time, effort, and expense, and it is often more efficient to dispense with the opportunity for such a hearing. But these rather ordinary costs cannot outweigh the constitutional right.").

post-seizure hearings at which the government must demonstrate—among other things—that it had probable cause to seize the vehicle and that continued retention of the vehicle for the duration of the forfeiture proceedings is necessary. As Respondents and fellow *amici* note, this type of preliminary hearing is a streamlined affair that has worked well and occurs only when a person with standing to contest the forfeiture requests it.[34] Despite the predictions of chaos, these orderly proceedings—even in one of the busiest court systems in the country—have not burdened the government in any meaningful way.

CONCLUSION

Private property is one of this nation's most cherished principles, but it is a principle under assault. The changes to civil forfeiture that gave law-enforcement agencies a percentage of forfeiture proceeds have created a powerful incentive: seize, forfeit, and profit. But this pecuniary interest has distorted law-enforcement priorities, altered officer and prosecutor behavior, and, most disturbingly, led to a number of police and prosecutorial abuses. By acknowledging that due process requires the prompt

[34] *Amicus* Brief of Cato Institute, Goldwater Institute, and Reason Foundation.

judicial evaluation of the executive's seizure decisions, this Court will curb those abuses and protect one of our most fundamental rights.

For all the foregoing reasons, *amicus curiae* Institute for Justice respectfully requests that this Court affirm the opinion below.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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In the
Supreme Court of the United States

ANITA ALVAREZ,
State's Attorney of Cook County, Illinois,

PETITIONER,

v.

CHERMAINE SMITH, EMMANUEL PEREZ, TYHESHA BRUNSTON, MICHELLE WALDO, KIRK YUNKER, AND TONY WILLIAMS,

RESPONDENTS.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF AMICUS CURIAE THE LEGAL AID SOCIETY IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

In determining whether the Due Process Clause requires a state or local government to provide a post-seizure probable cause hearing prior to a statutory judicial forfeiture proceeding and, if so, when such a hearing must take place, should district courts apply the "speedy trial test" employed in *United States v. $8,850*, 461 U.S. 555 (1983) and *Barker v. Wingo*, 407 U.S. 54 (1972), or the three-part due process analysis set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976)?

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INTEREST OF THE AMICUS CURIAE

The Legal Aid Society of New York City represents individuals who are unable to afford private counsel.[1] Its Criminal Defense Practice serves as court-appointed counsel for some 236,000 individuals annually drawn into the criminal process. Many arrested persons are deprived of their property, such as cars or cash, as part of the arrest process. The New York City Police Department has for years sought the civil forfeiture of property seized from arrestees on the ground that it was used in the commission of crime.

The Legal Aid Society has actively litigated in state and federal court to safeguard the right of procedural due process for those individuals whose property has been seized and held by the Police Department. Its Special Litigation Unit initiated a class action and attained a ruling from the United States Court of Appeals for the Second Circuit that any person whose automobile was seized and impounded upon arrest has the constitutional right to a prompt post-seizure hearing at which to challenge the legitimacy and necessity of continued impoundment of the vehicle during the pendency of a forfeiture action. *See Krimstock v. Kelly*,

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amicus curiae, or its counsel made a monetary contribution intended to fund its preparation or submission. The parties have consented to the filing of this brief and such consents are being lodged herewith.

306 F.3d 40 (2d Cir. 2002), *cert. denied*, 539 U.S. 969 (2003). This hearing process has been institutionalized for more than five years at a city administrative tribunal. Legal Aid Society attorneys have often represented individuals at such proceedings, and the Special Litigation Unit continuously monitors the process to ensure that class members' opportunity to be heard remains a reality.

This Court's decision in the instant case may affect the constitutional underpinnings of the vehicle retention hearing process that has developed. Amicus Legal Aid Society, on behalf of the many current and future participants in that process, has a strong interest in its continuation. In addition, Amicus can demonstrate empirically that, in the more than five years of its operation, the vehicle retention hearing has effectuated a prompt and meaningful opportunity to be heard for countless individuals whose cars have been impounded, with no negative effects on the legitimate interests of law enforcement.

SUMMARY OF ARGUMENT

The Seventh Circuit ruled that, where property has been seized for forfeiture, its owner has a due process right to a prompt hearing "to show that the property should be released." *Smith v. City of Chicago*, 524 F.3d 834, 838 (7th Cir. 2008). In so ruling, the court properly applied the three-part balancing test of *Mathews v. Eldridge*, 424 U.S. 319 (1976), which determines "what process is due" when one is deprived

of property. The court also correctly applied the due process precepts of *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993), in which this Court ruled that, when the government seizes private property for forfeiture, the Due Process Clause requires an initial adversary hearing to test the validity of its retention of that property. *Mathews* is the applicable test to decide if due process requires a prompt hearing to determine custody of the property during a forfeiture action. Cases dealing with speedy trial limitations on the time limits for prosecuting the ultimate forfeiture action are not relevant. They concerned the right to outright dismissal of the forfeiture case, not the right to possession of the property during the pendency of the case.

The experience of New York City has been instructive with respect to the necessity and feasibility of a prompt post-seizure hearing where automobiles are impounded pursuant to a forfeiture program. In a factual context in which numerous vehicles were impounded for months and years without a meaningful opportunity for their owners to be heard, the Second Circuit held in *Krimstock v. Kelly* that due process requires a prompt post-seizure hearing at which the deprived owner can test the legitimacy and necessity of further impoundment of the vehicle. The ruling followed the *Mathews* test and the *James Daniel Good* application, and was found persuasive by the Seventh Circuit in *Smith*.

The operation of the vehicle retention hearing process in New York City since its inauguration in 2004

confirms the necessity of a prompt hearing to prevent the erroneous deprivation of property on a wide scale. The opportunity to be heard for vehicle owners at a meaningful time has corrected numerous instances of unwarranted retention of vehicles by the local government. In addition, more than five years of experience with the hearing process has demonstrated no exceptional burden on the local forfeiture program or any interference with criminal prosecutions. The New York City experience empirically rebuts the hyperbolic speculations proffered by petitioner and Government amici as to the purported ramifications of the Seventh Circuit's decision.

ARGUMENT

I. THE DUE PROCESS CLAUSE PROTECTS THE RIGHT TO A PROMPT POST-SEIZURE HEARING TO CONTEST CUSTODY OF PROPERTY IMPOUNDED FOR FORFEITURE.

The Seventh Circuit in *Smith v. City of Chicago* explicitly agreed with the Second Circuit's decision in *Krimstock v. Kelly* that held that vehicle owners have a right to a prompt post-seizure hearing to challenge further retention of vehicles impounded for forfeiture. 524 F.3d at 837-38. The *Krimstock* ruling was made in the context of a local forfeiture program that

aggressively sought forfeiture of vehicles seized and impounded when the operator was accused of a crime.

A. New York City's Vehicle Confiscation Program

In the mid-1980s, the New York City Police Department (the "Department") began a program of confiscating vehicles upon the arrest of the operator. The legal authority for the seizure program was Section 14-140(e) of the Administrative Code, a local ordinance. The provision stated that a person who used any property "as a means of committing crime...or in furtherance of a crime...or permitted or suffered the same to be used...shall not be deemed to be the lawful claimant entitled to...such...property."

The seizure authority encompassed property allegedly used to further any "crime," felony or misdemeanor. The Department regularly impounded, for a prospective civil "forfeiture" action, vehicles seized in conjunction with an arrest for possession or sale of drugs, possession of a gun, or solicitation for prostitution. The civil action sought a declaration that the owner of such a vehicle was not a "lawful claimant" to the property.

New York appellate courts regularly upheld forfeiture judgments in such cases. *See, e.g., Property Clerk v. Negron*, 157 AD2d 602, 603, 550 NY3d 351 (1st Dept. 1990) (drugs). Dismissal of the criminal charge was no barrier to a civil forfeiture judgment. *See, e.g., Property Clerk v. Jacobs*, 234 AD2d 96, 650

NYS2d 711 (1st Dept. 1996) (criminal case for solicitation of prostitution had been dismissed); *Property Clerk v. Larouche*, 187 AD2d 289, 589 NYS2d 459 (1st Dept. 1992) (criminal charge for possession of cocaine residue had been dismissed). No disposition of the criminal case, even an acquittal, could preclude an Administrative Code forfeiture action. *See Property Clerk v. Ferris*, 77 NY2d 428, 430, 570 NE2d 225 (1991) ("the outcome of the underlying criminal charges is irrelevant to the outcome of the civil forfeiture proceeding"). In *Ferris*, the promise of the prosecutor to return the vehicle as part of a plea bargain was held not binding on the Police Department.

The sole venue to effect release of an impounded vehicle was the Supreme Court, Civil Term. (In New York, the trial court is called the Supreme Court.) If a demand for an impounded vehicle was served upon the Department, it was obligated to commence an action within 25 days if it wished to retain the vehicle. Title 38, Rules of the City of New York, Section 12-36. The City's rules, however, required only that the Department commence such an action. They imposed no obligation to move the case beyond the initial filing. Nor did the Administrative Code, the City Rules, or court rules afford the owner of seized property any early opportunity to obtain its return *pendente lite*.

The local forfeiture program of New York City must be distinguished from New York State's forfeiture law, contained in Article 13-A of the Civil Practice Law and Rules. Enacted in 1984, that law authorized a

prosecutor to institute a civil action to forfeit property that was the proceeds or instrumentality of a crime. It was restricted to felonies involving narcotics. CPLR §1310. The State law permitted *ex parte* attachment of property. However, the seizing agency was required to confirm the attachment by moving for a hearing within five days, at which hearing it must show a likelihood of success and that the need to retain the property outweighed any hardship suffered by the owner. CPL 1312. A defendant also could move to vacate or modify an attachment. CPLR 1312(4). Because of this availability of early and interim relief, the New York Court of Appeals held that the seizure provision did not violate the Due Process Clause. *Morgenthau v. Citisource*, 68 NY2d 211, 222, 500 NE2d 850 (1986). Applying the *Mathews v. Eldridge* balancing test, the Court concluded that the procedural safeguards in CLPR 1312 protected defendants from an erroneous deprivation of their property. *Id.*

In contrast, as noted, the automobile confiscation program of the New York City Police Department was not constrained by early court review or an opportunity for interim relief for the owner. The trial of the forfeiture action was the only legal proceeding to obtain return of the vehicle following its warrantless seizure. Trials were an infrequent occurrence. In 1998, of the 1,800 cars that had been seized and held for forfeiture, fewer than one percent went to trial. *See* David Rohde, "The High Price of Drunken Driving Law," *NY Times*, Feb. 28, 1999.

In 1999, the Department's car seizure program expanded dramatically with the inclusion of arrests for driving while intoxicated (DWI) as a predicate for impoundment. The new policy multiplied the number of vehicles in long-term police custody. By July 2001, over 4,000 seizures of the vehicles of DWI arrestees had been made. *See* Jacob Fries, "4000 Cars Seized in Effort to Halt Drunken Driving," *NY Times*, July 3, 2001.

B. The Second Circuit's Due Process Ruling

The *Krimstock* class action was commenced in December 1999 in the Southern District of New York. The plaintiffs sought an opportunity for prompt post-seizure court review under the Due Process Clause for those many individuals whose vehicles had been confiscated by the Department. The seven named plaintiffs were individuals whose vehicles had been held for many months with little or no action in civil court. The district court dismissed the case. It ruled that the plaintiffs were not entitled to a prompt probable cause hearing because the "forfeiture proceeding" was all that due process required. *See Krimstock v. Kelly*, 2000 WL 1702035 (SDNY 2000).

The court of appeals reversed. It concluded that procedural due process in the car impoundment setting requires a prompt hearing before a neutral fact-finder to test the probable validity of the case for forfeiture and the necessity for continued impoundment during the pendency of the forfeiture action. *Krimstock v. Kelly*,

306 F.3d 40, 69-70 (2d Cir. 2002), *cert. denied*, 539 U.S. 969 (2003). The Due Process Clause requires such an opportunity to be heard "in order minimize any arbitrary or mistaken encroachment upon plaintiffs' use and possession of their property." *Id.* at 53. The core of the Second Circuit's due process analysis was the application of the three-part balancing test of *Mathews v. Eldridge*, which examines (1) the private interest affected; (2) the risk of erroneous deprivation of that interest in the absence of procedural safeguards; and (3) the Government's interest.

First, as to the private interest, the court took note of the paramount importance of the automobile in modern American life, "providing access to jobs, schools, and recreation as well as to the daily necessities of life." 306 F.3d at 61, quoting *Coleman v. Watt*, 40 F.3d 255, 260-61 (8th Cir. 1994). This interest was enhanced by "the length of the deprivation," given that "the City retains seized vehicles for months or sometimes years before the merits of a forfeiture action are addressed." *Krimstock v. Kelly*, 306 F.3d at 62.

Second, as to the risk of erroneous deprivation, the court stated: "Neither the arresting officer's unreviewed probable cause determination nor a court's ruling in the distant future on the merits of the City's forfeiture claim can fully protect against an erroneous deprivation of a claimant's possessory interest as his or her vehicle stands idle in a police lot for months or years." *Id.* Although the court believed the risk of error to be reduced in an ordinary DWI arrest, other factors

enhanced the risk of an erroneous deprivation. For one, there was "a heightened potential for erroneous retention" of the vehicles of innocent owners, persons not implicated in any criminal conduct, in the absence of an "early retention hearing." *Id.* at 58, 63. In addition, "the City's pecuniary interest" in the outcome of forfeiture proceedings necessitated "greater procedural safeguards" to protect against arbitrary impoundments. *Id.* at 63. The court cited the statement in *United States v. James Daniel Good Real Property*, 510 U.S. 43, 55-56 (1993) that those "greater procedural safeguards" are of "particular importance" when "the Government has a direct pecuniary interest in the outcome of the proceeding." 306 F.3d at 63. Money from the sale of vehicles seized by the Department goes to the City of New York. *See* Admin. Code §14-140 (6).

Moreover, again referring to *James Daniel Good*, the court stressed that the impact of erroneous deprivation was heightened in the vehicle impoundment setting because of the absence of any recompense for losses occasioned by erroneous vehicle retentions. It noted that "[a]n owner cannot recover the lost use of vehicle by prevailing in a forfeiture proceeding," and suffers additional loss as the vehicle "continues to depreciate in value as it stands idle in the police lot." 306 F.3d at 64 (citation omitted). As this Court stressed in *James Daniel Good*, the "ultimate judicial decision" in the forfeiture action, even if favorable, would 'not cure the temporary deprivation that an earlier hearing might have prevented,'" 510 U.S. at 56 (citing

Connecticut v. Doehr, 501 U.S. 1, 15 (1991)). By the same reasoning, the *Krimstock* opinion pointed out, an earlier hearing had been found not necessary in *Mathews v. Eldridge* partly because of the availability of full retroactive benefits if the plaintiff ultimately prevailed. 306 F.3d at 64, citing *Mathews*, 424 U.S. at 340.

The third *Mathews* factor addresses the Government's interest in the operation and cost of an additional procedural requirement. The most notable interest identified by the Second Circuit was the City's concern that a seized vehicle not be sold or destroyed before a forfeiture judgment. The court observed that other means of restraint could safeguard that interest, in particular a restraining order to prohibit sale of a vehicle, or a bond. *Id.* at 65. The utilization of "less drastic measures than continued impoundment" could be considered at the retention hearing. *Id.* at 70.

One year after the *Krimstock* decision, the New York Court of Appeals ruled that due process requires a prompt post-seizure hearing for vehicles seized pursuant to Nassau County's forfeiture program. *County of Nassau v. Canavan*, 1 NY3d 134, 141, 802 NE2d 616 (2003). The Court applied the *Mathews v. Eldridge* balancing test.

As did the *Krimstock* court, the New York Court of Appeals took note of the compelling private interest affected by loss of an automobile, which is "often an essential form of transportation, and, in some cases,

critical to life necessities, earning a livelihood and obtaining an education." *Id.* at 143. This loss is exacerbated during the pendency of a forfeiture action that "may not be finally resolved for many months or years." *Id.* at 142. The Court of Appeals pointed out that "the risk of erroneous deprivation is heightened when the driver is not the owner or sole user of the seized vehicle." *Id.* at 143. But even in other cases, the opinion pointed out, "the importance of defendants' possessory interest [is not] diminished by the likelihood that they might lose and the County might eventually prevail in forfeiture proceedings. 'Fair procedures are not confined to the innocent.'" *Id.*, citing *James Daniel Good*, 510 U.S. at 62.

C. The Necessity of the *Mathews* Balancing Test

In applying the three-part *Mathews v. Eldridge* balancing test in determining whether due process requires a prompt post-seizure retention hearing, the Second Circuit and the New York Court of Appeals were following the law set down by this Court. *See, e.g., Connecticut v. Doehr*, 501 U.S. 1, 10 (1991) (*Mathews* test used to judge inadequacy of *ex parte* attachment procedures); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434 (1982) (*Mathews* test for job termination procedures). In deciding the scope of procedural due process required in a given setting, this Court has repeatedly returned to the *Mathews* balancing test. "The ordinary mechanism that we use for balancing such serious competing interests, and for determining the procedures that are necessary to ensure

that a citizen is not 'deprived of life, liberty, or property, without due process of law,' U.S. Const. Amdt. 5, is the test we articulated in *Mathews v. Eldridge*." *Hamdi v. Rumsfeld*, 542 U.S. 507, 528-29 (2004) (citations omitted). The *Mathews* balancing test sets out "a framework to establish the sufficiency of particular procedures." *Wilkinson v. Austin*, 545 U.S. 209, 224 (2005).

The *Mathews* balancing test enables courts to determine whether a State has met "the fundamental requirement of due process," which is "the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" 424 U.S. at 333. There is no "forfeiture exception" to application of the *Mathews* balancing test. On the contrary, in *James Daniel Good* the *Mathews* test was central to the analysis that, with respect to seizure of property pursuant to a federal forfeiture statute, an early hearing to test the legitimacy of the seizure is required by due process. The fact that the predicate for seizure is a forfeiture program only underscores the need for an opportunity to be heard before a neutral magistrate. As the Court explained, the Government's "financial stake in drug forfeiture" heightened the need for the property owner to be afforded the protection of an early adversary hearing. 510 U.S. at 55-56 and n.2.

This Court did not hold that the early hearing was restricted to seizures of real property. The nature of the property affects only whether the early hearing comes before or after seizure. A pre-seizure hearing is

necessary before seizure of real property. Property that is movable may be seized first, with the hearing to follow promptly after the seizure.

This Court's constitutional analysis in *James Daniel Good* was concerned less with the type of property taken than with the dangers inherent in *ex parte* seizure, which "creates an unacceptable risk of error." *Id.* at 55. The "ultimate judicial decision" in the forfeiture action, "coming months after the seizure," would not cure the deprivation "that an earlier hearing might have prevented." *Id.* at 56 (citation omitted). The Court stressed that even if money, and not realty, "were the only deprivation at issue, it would not render the loss insignificant or unworthy of due process protection." *Id.* at 54. Good's interest, in fact, was not in the real property itself, which he did not occupy, but in the $900 in monthly rent that he received. *Id.* The Court's reliance on *Fuentes v. Shevin*, 407 U.S. 67 (1972), which covered kitchen appliances and household furniture, accentuates that the procedural protection of an earlier hearing is not confined to real property. The overriding purpose of procedural due process is to protect the "use and possession of property from arbitrary encroachment". *Id.* at 53-54.

City of Los Angeles v. David, 538 U.S. 715 (2003) further underlines the necessity of applying the *Mathews* balancing test. David's car was towed for a parking violation; he immediately paid $134.50 to release it from impoundment. A divided Ninth Circuit panel ruled that a hearing held 27 days later on the

merits of the parking violation was untimely under the Circuit's procedural due process cases regarding seized automobiles. *See David v. City of Los Angeles*, 307 F.3d 1143 (9th Cir. 2002).

This Court reversed. In doing so, it applied the *Mathews* balancing test, as the Ninth Circuit majority had not. Application of the first factor was telling. The "private interest" at stake was not the automobile, which had been quickly recovered, but the $134.50, deprivation of which was fully recompensable. 538 U.S. at 717-18. As to the second factor, the likelihood of error for lack of an immediate hearing was very much reduced, since the parking violation at issue was a simple, straightforward issue. *Id.* at 718. And the burden on the Government -- 1,000 or more hearings annually within 48 hours, the vast majority with only a relatively small amount of money at stake -- was considerable. On balance, the 27-day delay for a hearing "to consider claims of the kind here at issue" did not violate the Due Process Clause *Id.* at 719.

In addition to its reliance on the *Mathews* test, the *David* decision is pertinent to the merits of the instant case. It characterizes the "temporary deprivation of the use of the automobile" as a "far more serious harm" than the relatively small amount of money at issue. *Id.* at 717. The dissenting Ninth Circuit judge in *David* was equally emphatic about the distinction, pointing out that deprivation of an automobile would warrant an early hearing. 307 F.3d at 1149 (Kozinski, J., dissenting). As the *Krimstock* and *Smith* courts

concluded, deprivation of one's automobile provides a compelling case for a prompt opportunity to be heard in order to achieve its return.

D. The Irrelevance of the *$8850/Von Neumann* Speedy Trial Cases

The Government parties urge that this Court not apply the *Mathews v. Eldridge* test but instead refer only to the speedy trial test of *United States v. $8,850*, 461 U.S. 555 (1983) and *United States v. Von Neumann*, 474 U.S. 242 (1986). Those cases rejected attempts to dismiss as untimely Government actions against property. The courts in *Krimstock* and *Smith* found them to be inapplicable to the question whether an initial hearing to contest custody of the confiscated property *pendente lite* was warranted.

United States v. $8,850 set down a speedy trial standard for federal forfeiture actions. It did not concern the right to an initial hearing, but only the broad time limits within which a federal forfeiture action must be commenced. The property claimant there sought to dismiss the case as untimely. This Court held that dismissal was not required because the Government had shown diligence and given reasonable explanations for the 18-month delay. *Id.* at 569. It applied the four-part speedy trial test for criminal cases of *Barker v. Wingo*, 407 U.S. 514 (1972).

Of course, that speedy trial right coexists in every criminal case with the right to a prompt initial hearing

set out in *Gerstein v. Pugh*, 420 U.S. 105 (1975), and *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991) (arrestee can challenge detention within 48 hours of arrest). That is the analogous right at issue in the vehicle impoundment context. The right to an initial hearing to challenge whether impoundment should continue throughout the forfeiture case is not an attempt to obtain dismissal of that case on speedy trial grounds, any more than acknowledging an accused person's right to seek release pending trial requires dismissal of the criminal case as well.

The claimant in *$8,850* had not used any of the available remedies that would have afforded her an "early judicial hearing." 461 U.S. at 569. Among those remedies was a motion under Federal Rule of Criminal Procedure 41(e) (now Rule 41(g)) for return of seized property. *Id.* Rule 41(e) provided for a judicial hearing whenever a person subjected to "deprivation of property" by a federal officer sought return of the property. It is noteworthy that this Court set the speedy trial forfeiture standard in a setting where an early judicial hearing on return of the property was already available. Even if a trial on the ultimate question of legal entitlement to the property was months or years away, the property owner in a federal action had early access to a judicial forum to regain use of the property during the pendency of the litigation.

The Government parties lay heavy emphasis on a sentence from *United States v. Von Neumann*, 474 U.S.

at 249 (1986), which said "[i]mplicit in this Court's discussion of timeliness in $8,850 was the view that the forfeiture proceeding, without more, provides the post-seizure hearing required by due process..." The forfeiture proceeding referred to concerned "Von Neumann's property interest in the car." *Id.*

The ultimate "property interest" in cars or other property is not the issue here; the issue is the right to an initial hearing with respect to a party's present possessory interest in the property. That initial proceeding would not end the case or resolve the issue whether ownership passed to the Government under forfeiture. In *Von Neumann*, neither seizure nor retention of the car was an issue. Von Neumann's car had been released to him within two weeks of its seizure by customs officials. 474 U.S. at 245-46. As did the claimant in *$8,850*, Von Neumann sought a definitive ruling in his favor based on a timeliness challenge that would terminate the government's claim.

His claim was that the Custom Service's 36-day delay in ruling on his remission petition violated due process and required cancellation of the $3,600 penalty it had imposed for failing to declare his foreign car at the border. This Court rejected his claim, noting that "his right to a forfeiture proceeding meeting the *Barker* test satisfies any due process right with respect to the car and the money." Von Neumann had not shown that a 36-day delay in the "disposition of his remission petition" deprived him of due process. *Id.* at 251. The

remission petition, which "terminates the dispute," (*id.* at 248-50 n.8) was subject to the same speedy trial criteria as the trial on the merits. The initial hearing to contest the custody of the property pending the litigation on the merits -- the only issue here -- was simply not an issue in *Von Neumann*.

Any doubt about the dual due process requirement in a forfeiture case -- a prompt initial hearing to address custody of seized property and an ultimate trial on the merits of forfeiture -- was subsequently settled in *James Daniel Good*. This Court put the separate questions of the initial hearing and the timeliness of the forfeiture trial in clear relief. The initial hearing was the "principal question." A "second issue," the Court stated, was "the timeliness of the forfeiture action." 510 U.S. at 46. The Court dealt with this "second issue" in a separate section at the end of the opinion. Good, like the money claimant in *U.S. v. $8,850*, sought to dismiss the forfeiture action against his property on the grounds that it was untimely. The Court, citing *$8,850* among other cases, ruled that dismissal was not required. Id. at 65. Clearly, the initial hearing and the ultimate proceeding on the merits are separate rights. The contention that *$8,850* and *Von Neumann* rule out an initial hearing and that due process requires only the ultimate forfeiture trial is incompatible with the holding and reasoning of *James Daniel Good*.

That contention is likewise incompatible with this Court's due process jurisprudence on the necessity

of a prompt hearing to be able to test the "probable validity" of a government entity's claim against seized property. As the Court stated with regard to money seized in a "jeopardy assessment" by the Internal Revenue Service:

> This court has recently and repeatedly held that, at least where irreparable injury may result from a deprivation of property pending final adjudication of the rights of the parties, the Due Process Clause requires that the party whose property is taken be given an opportunity for some kind of predeprivation or prompt post-deprivation hearing at which some showing of the probably validity of the deprivation must be made.

Commissioner of Internal Revenue v. Shapiro, 424 U.S. 614, 629 (1976) (emphasis supplied).

Notably, the necessity for an interim hearing is not less when the "government function" involved is the collection of taxes by the federal government. This function is surely a more crucial area of government activity than forfeiture programs, which are entirely discretionary and vary greatly, when pursued at all, among states and localities. The controlling constitutional factor is not how Government characterizes the seizure, but whether "irreparable injury

may result from a deprivation of property pending final adjudication of the rights of the parties." *Id.*

II. NEW YORK CITY'S VEHICLE RETENTION HEARING EXEMPLIFIES A PROMPT OPPORTUNITY TO BE HEARD TO RECOVER POSSESSION OF IMPOUNDED PROPERTY AND DOES NOT ENCUMBER THE LEGITIMATE INTERESTS OF LAW ENFORCEMENT.

A. The Contours of the Vehicle Retention Hearing

The Second Circuit in *Krimstock* remanded the case to the district court to formulate, "in consultation with the parties," the outlines of the vehicle retention hearing. 306 F.3d at 70. At the City's suggestion, the district court chose as the locus of the hearings the Office of Administrative Trials and Hearings ("OATH"). *See Jones v. Kelly*, 378 F.3d 198, 200 (2d Cir. 2004). OATH is a tribunal within the executive branch of the city government; it adjudicates matters for a variety of city agencies.

The district court's order setting up the process governs the timing and structure of the hearing procedure. (The current order, the Third Amended Order & Judgment ("*Krimstock* Order"), 99 Civ. 12041 (HB) is accessible at 2007 U.S. Dist. LEXIS 82612, as well as the OATH website.) The hearing is not to be scheduled automatically, but only upon the demand of an eligible claimant, which is either the person from

whom the vehicle was seized, or the registered owner (who has priority). A request for a hearing must be made on a Department form, which the Department must provide to the arrestee and, one week later by mail, to the registered owner. A hearing must be scheduled to take place within 10 business days of the receipt by the Department of the hearing request. The date of the hearing may be extended upon a showing of good cause by either party. (*Krimstock* Order, paras. 4-6)

At the vehicle retention hearing, in order to continue its retention of the vehicle, the Department must demonstrate: (a) probable cause for the arrest of the vehicle operator; (b) likelihood of success in the forfeiture action; and (c) necessity of retention to preserve the vehicle for the forfeiture action, or if return would present a heightened danger to public safety. Reliable hearsay is admissible. The vehicle claimant may testify and present evidence. If the Department sustains its burden, the vehicle will be retained; if it does not, the vehicle must be returned to the claimant. (*Krimstock* Order, para. 3)

The decision of the OATH judge as to retention or release does not affect the right of the Department to seek forfeiture of the vehicle, or to seek review of the retention decision in Supreme Court. The Order states: "Any decision made by an OATH judge shall not be binding in any way upon the Criminal or Supreme Court in any proceeding." Nor is any legal or factual theory

advanced by the Government binding in Criminal or Supreme Court. (*Krimstock* Order, para. 3)

The Third Amended Order also enables a prosecutor to obtain an ex parte retention order from a Criminal Court judge if he or she believes retention is necessary to preserve the vehicle as evidence for the criminal case. The OATH hearing is postponed during the pendency of such an order. (*Krimstock* Order, paras. 8-12)

OATH Rule 1-31 requires that a settlement conference be held before each scheduled hearing. Cases are often settled. Generally, the settlement requires the claimant to give money to the Department, in return for which the Department agrees to return the vehicle and not to pursue a forfeiture action. If a hearing is held, the OATH judge issues a short written decision within three business days.

The vehicle retention hearing process at OATH started in February 2004. Until that time, throughout the litigation in the district court and the Second Circuit, and during the proceedings on remand in the district court, the Department had continued to confiscate vehicles. By the outset of the hearing process, 6,000 cars were in police custody "in legal limbo." Many had been held for years. None had reached a judgment in a forfeiture action. *See* Susan Saulny, "City Police Giving Back Seized Cars," *NY Times*, Mar. 9, 2004. After the district court ordered the Department to either return the

vehicles to their owners or afford them a hearing, the Department made the vast majority of the backlog group available for return.

B. The Working of the Vehicle Retention Hearing: 2004-2009

In the more than five years since February 2004 in which the vehicle retention hearing, or *Krimstock* hearing, has been operating for seized vehicles, there have been several constants. One constant is the nature of the evidence put forth by the Department. As to the merits of the case, the evidence is entirely hearsay. The Department has never presented a police witness to testify at a vehicle retention hearing. And OATH judges have rejected any attempts to subpoena the arresting officer. *See Police Dept. v. McBrien*, OATH Index No. 1058/09 (Oct. 2, 2008). (All OATH decisions are available at http://www.nyc.gov.html/oath)

In addition to the record of convictions, if any, of the vehicle operator, the Department offers as evidence hearsay police reports, usually the criminal complaint and the arrest report. In most cases, if the facts are not controverted, the OATH judge accepts the police documents as sufficient to sustain the Department's burden on the first two prongs, which are probable cause and the likelihood of proving in the forfeiture action that the vehicle was the instrumentality of a crime. *See, e.g., Police Dept. v. Pelle*, OATH Index No. 2666/08 (June 27, 2008). *But see Police Dept. v.*

Williams, OATH Index No. 1899/04 (May 4, 2004) (police reports insufficiently detailed and reliable); *Police Dept. v. Gurley*, OATH Index No. 421/07 (Sept. 12, 2006) (vehicle not sufficiently linked in police reports to sale of untaxed cigarettes).

Some vehicle claimants have prevailed by presenting credible testimony that rebuts the assertions in police documents. *See, e.g., Police Dept. v. Craig*, OATH Index No. 1138/06 (Feb. 22, 2006). In another case, where the issue was whether the claimant was actually driving the vehicle in question, the OATH judge credited the testimony of the claimant and his witnesses that he was not driving the car, but keeping it running to use the radio for a block party. *See Police Dept. v. Rios*, OATH Index No. 146/06 (July 21, 2005). In a recent decision, the judge found the claimant's "detailed and consistent" testimony more credible than the Department's documentary evidence on each of the three prongs of the *Krimstock* test. *See Police Dept. v. Morton*, OATH Index No. 3260/09 (July 6, 2009).

Another frequently litigated issue at OATH is whether return of the vehicle to the claimant would prevent a "heightened risk to public safety." The usual parameters in a DWI case are that a high breathalyzer reading, prior vehicle-related infractions, or aggravating circumstances in the incident itself will justify a retention order in the Department's favor. *See, e.g., Police Dept. v. Figueroa*, OATH Index No. 391/08 (Oct. 2, 2007) (vehicle retained where breathalyzer

reading was .173%). In contrast, a breathalyzer reading that is not exceptionally high, along with the absence of a criminal history, militate in favor of return of the vehicle. *See, e.g., Police Dept. v. Kennerly*, OATH Index No. 706/08 (Oct. 16, 2007) (vehicle returned where breathalyzer reading was slightly over the legal limit and claimant was first offender).

For a claimant to prevail on the "heightened risk" issue, oral testimony, as a practical matter, is required. OATH judges, as their opinions reflect, carefully assess the credibility and reliability of the claimant. As one judge concluded in ordering return of a vehicle, "all available evidence suggests that respondent has led a law-abiding life and that this incident was an aberration." The judge noted that the testimony and demeanor of the claimant were key to his decision. *See Police Dept. v. Javier*, OATH Index No. 241/06 (Aug. 5, 2005). It is not uncommon for claimants with pending criminal cases to decline to speak about the facts of the incident leading up to the arrest, but to limit their testimony to the "heightened risk" issue. *See, e.g., Police Dept. v. Vanegas*, OATH Index No. 1056/06 (Jan. 10, 2006).

Numerous other decisions reflect the importance of personal testimony to prevail on this point. *See, e.g., Police Dept. v. Holburn*, OATH Index No. 879/08 (Oct. 31, 2007) (DWI arrestee "forthright about the circumstances" and "genuinely mortified and remorseful about his behavior"). By the same token, a judge's

conclusion that a claimant's testimony showed insufficient appreciation of the gravity of the matter was a factor in the decision to deny return of the vehicle. *See Police Dept. v. Watts*, OATH Index No. 1865/08 (Mar. 5, 2008).

Testimony of the vehicle owner is especially critical in an "innocent owner" case. Although the Department has the ultimate burden to disprove such a defense, *Property Clerk v. Pagano*, 170 AD3d 30, 34-35, 573 NYS2d 658 (1st Dept. 1991), the vehicle owner must credibly put forward the defense at the hearing and be subject to cross-examination. The judge's decision often hinges on an assessment of witness credibility, in conjunction with an evaluation of circumstantial evidence, on the issue whether the owner knew or should have known that the vehicle would be used in a crime.

More often than not, the decision after a hearing in an innocent owner case is that the vehicle be returned to the owner. (Use of the search terms "innocent owner" and "Krimstock" will access many such cases on the OATH website.) The most common scenario involves an older relative lending a vehicle to a younger relative, who gets arrested. *See, e.g, Police Department v Arroyo, Sr.*, OATH Index No. 2016/06 (June 30, 2006) (vehicle returned to father who had lent it to son); *Police Dept. v. Harding*, OATH Index No. 173/07 (Apr. 16, 2007) (mother lent car to son); *Police Dept. v. Gutierrez*, OATH Index No. 2403/07 (Aug. 15, 2007)

(same). Cars lent to friends also result in innocent owner adjudications at OATH. *See, e.g., Police Dept. v. Passley*, OATH Index No. 2401/07 (July 11, 2007). Virtually every vehicle return in such a case has been predicated on credible testimony by the owner that he or she did not know or have reason to know that the vehicle would be used in a crime.

C. The Indispensability of the Prompt Post-Seizure Hearing

"No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it." *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 170-72 (1951) (Frankfurter, J., concurring). Justice Frankfurter's famous condensation of procedural due process was cited approvingly by this Court in *James Daniel Good*, 510 U.S. at 55.

The working of the vehicle retention hearing underlines the truth of this statement. The opportunity to be heard need not be elaborate or constricted by rules of evidence. OATH judges uniformly stress the limited purview of the hearing. Each decision cites the same language from the Second Circuit's opinion: "The due process rights at issue here require 'an initial testing of the merits of the City's case,' not 'exhaustive evidentiary battles that might threaten to duplicate the eventual forfeiture hearing.' *Krimstock*, 306 F.3d at 69-70." *See,*

e.g., Police Dept. v. Achakpo, OATH Index No. 1211/09 (Nov. 19. 2008); *Police Dept. v. Satyanand*, OATH Index No. 570/05 (Nov. 13, 2004).

The Seventh Circuit in *Smith* emphasized the same principle: "The hearing should be prompt but need not be formal....We do not envision lengthy evidentiary battles which would duplicate the final forfeiture hearing. The point is to protect the rights of both an innocent owner and anyone else who has been deprived or property...." *Smith v. City of Chicago*, 524 F.3d at 838-39.

For many claimants at vehicle retention hearings, the opportunity to be heard has been, not a term of art, but a literal opportunity to be heard. The key factor in a judge's decision to order return of a vehicle has often been the claimant's credible testimony as to the facts of the incident, or to innocent ownership, or to whether return would present a threat to public safety. This Court has stressed that "[t]he opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985). The experience at OATH demonstrates why the "opportunity to present his side of the story," *id.*, is indispensable for one facing long-term deprivation of property.

Equally significant is the opportunity to point out the insufficiency of the government's case. This Court,

citing *Loudermill*, recently stressed the constitutional necessity to provide "a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." *Hamdi v. Rumsfeld*, 542 U.S. at 532. The examples from OATH cases illustrate that the opportunity to challenge the Department's hearsay allegations has rescued numerous vehicles from continued erroneous impoundment.

In the 2008 fiscal year at OATH, which covered the period from July 1, 2007 through June 30, 2008, OATH judges decided 59 cases after holding a hearing. Examination of the results shows that 37 decisions ordered return of the vehicle to the claimant, while in 22 cases the Department was allowed to retain the vehicle.

The vehicle retention hearing process has exposed the large proportion of unnecessary and erroneous property deprivations inherent in a vehicle impoundment program based entirely on warrantless seizures. The backlog of 6,000 vehicles that stood impounded, many for years, before the prompt post-seizure hearing went into effect in February 2004 represents the logical outcome of a governmental property seizure program unchecked by a "meaningful opportunity to be heard at a meaningful time."

It should also be pointed out that, at least in the vehicle impoundment setting, lack of an early hearing effectively forecloses the possibility of any due process at all for many owners. The average life of a standard

civil case in New York's Supreme Court is 27 months. *See New York State Unified Court System, 2007 Annual Report*, p.22, available at http//www.courts.state.ny.us/reports/annual/pdfs/2007annualreport.pdf . The "ultimate forfeiture proceeding" often referred to may not be for years after the initial seizure. Yet many owners have monthly leasing or financing obligations to meet on the impounded vehicle. Named plaintiff Sandra Jones in the *Krimstock* case, for example, continued making monthly payments of $482 for 10 months before she, an innocent owner, regained possession of her impounded vehicle. *See Krimstock v. Kelly*, 306 F.3d at 46. Many people cannot continue to make such payments, in addition to satisfying mandatory insurance costs, on a car that they cannot use, while having to finance alternate means of transportation during the extended period of deprivation. Missed payments can result in a loss of standing to challenge forfeiture. *See United States v. One 1986 Volvo 750T*, 765 F.Supp. 90, 91-2 (SDNY 1991) (termination of car owner's lease after missed payment extinguished standing to challenge forfeiture action).

Without means to achieve return of the vehicle *pendente lite* provided by the prompt hearing, many owners, unable to sustain a litigation challenge over the long haul while making payments on an impounded vehicle, would be forced to give up on their property. This is how the backlog of impounded vehicles "in legal limbo" grew to 6,000. For many owners, the "ultimate forfeiture proceeding" is a mirage if the vehicle is

impounded until then. In the absence of an early hearing, the Government in many cases could effectively gain permanent possession solely by means of a seizure whose validity is never reviewed in court. In such cases, procedural due process is not merely postponed, but never afforded.

Compared to the demonstrable value of the prompt hearing to vehicle owners, the burden on the Government has been minimal. The Department does not present police witnesses at the hearing, and OATH has generally accepted the paper case made up of police reports as sufficient to establish the Department's case on the merits, if unrebutted. The OATH proceeding has not provided early discovery for the criminal defendant. The arrest report and criminal complaint presented at OATH are also available at the outset of the criminal case. A discovery demand in a criminal case must be answered within 15 days, virtually the same timetable as the 10-business-day scheduling of the retention hearing. *See* Criminal Procedure Law, §240.80(3).

The Department has never maintained that the working of the vehicle retention process has been unduly burdensome. The early hearing does not foreclose or inhibit the Department's ability to pursue a forfeiture action in Supreme Court. Although plaintiffs have sought to amend the Order to ensure that claimants' rights are safeguarded, *see Krimstock v. Kelly*, 506 F.Supp. 2d 249, 253 (SDNY 2007), the Department has

never sought to alter or amend the process on the ground that it interfered with its forfeiture program.

The only challenge to the *Krimstock* process after February 2004 was on behalf of the prosecutors, who objected to the inclusion of any vehicle marked as "evidence" by a police officer. Ultimately, the Second Circuit allowed the prosecution in any vehicle seizure to obtain an ex parte order from a judge that would allow continued retention of the vehicle as long as it was needed as evidence. *See Krimstock v. Kelly*, 464 F.3d 246, 255 (2d Cir. 2006). The overall experience of the vehicle retention hearing process has shown no effect on the prosecution of the criminal case. The Second Circuit concluded, based on a hearing held in the district court: "The data presented by the witnesses confirm that no undue burden on criminal enforcement results from mandated review by a neutral fact finder." 464 F.3d at 252.

In sum, the prompt post-seizure hearing has effectuated what this Court has identified as "the two central concerns of due process:" one, "the prevention of unjustified or mistaken deprivations;" and two, "the promotion of participation and dialogue by affected individuals in the decisionmaking process." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980). The real-world furtherance of these core constitutional values confirms the soundness of the *Krimstock* and *Smith* decisions.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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ANITA ALVAREZ,
STATE'S ATTORNEY OF COOK COUNTY, ILLINOIS,
Petitioner,

v.

CHERMANE SMITH, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF THE NATIONAL ASSOCIATION OF COUNTIES, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL LEAGUE OF CITIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, U.S. CONFERENCE OF MAYORS, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the court of appeals correctly ruled that DAFPA is facially invalid because it does not provide for a preliminary postseizure hearing.

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Other Authorities

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Dee Edgeworth, Asset Forfeiture: Practice and Procedure in State and Federal Courts (2008) 5, 21

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Frank R. Booth, Bureau of Justice Assistance, U.S. Dep't of Justice, *Asset Forfeiture: Public Record and Other Information on Hidden Assets* (1988). 17
G. Patrick Gallagher, Bureau of Justice Assistance, U.S. Dep't of Justice, *Asset Forfeiture: The Management and Disposition of Seized Assets* (1988).....15, 18
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Office of National Drug Control Policy, *National Drug Control Strategy: 2009 Annual Report.* 2
Office of National Drug Control Policy, *The Economic Costs of Drug Abuse in the United States, 1992 - 2002* (2004).....1
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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal governments and officials throughout the United States.[1] The States have used forfeiture in aid of law enforcement for centuries. In recent years civil forfeiture laws such as DAFPA have become an important means of "deterring the rising incidence of the abuse and trafficking of [controlled] substances." 725 Ill. Comp. Stat. 150/2. Because of the importance to *amici* and their members of effectively combating drug crimes, *amici* submit this brief to assist the Court in its resolution of this case.

STATEMENT

1. *The purpose of drug asset forfeiture.* Illegal drugs inflict enormous costs on society. In 2002, the economic impact of drug-related crimes alone approached $110 billion in expenses and lost productivity. *See* Office of National Drug Control Policy, *The Economic Costs of Drug Abuse in the United States, 1992 - 2002* xii & fig. 6 (2004), *available at* http://www.ncjrs.gov/ondcppubs/publications/pdf/economic_costs.pdf (total cost of drug abuse may exceed $180 billion).

To combat drug trafficking and organized crime, all States and the Federal Government use forfeiture

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[1] The parties have consented to the filing of this *amicus* brief and their consent letters have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than *amici* and their members, has made a monetary contribution to the preparation or submission of this brief.

laws.[2] By targeting the assets and proceeds of trafficking networks, such laws enable the government to disrupt and dismantle these organizations instead of targeting individual conspirators. The Office of the President, in its annual drug control policy report, stated that "[u]ndermining the financial infrastructure of trafficking organizations has proven to be one of the most effective means to disrupt the market for illegal drugs." Office of National Drug Control Policy, *National Drug Control Strategy: 2009 Annual Report* 28, *available at* http://www.whitehousedrugpolicy.gov/publications/policy/ndcs09/2009ndcs.pdf.

This recognition of forfeiture's efficacy is likewise shared by the States. Entrusted with protecting the health and welfare of their citizens, state and local governments are at the front lines in the fight against trafficking. But the breadth of the drug problem requires a high level of cooperation between all levels of government.[3] In addition to coordinating

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[2] Recently, in response to the growing crisis posed by drug and gun trafficking across the Mexican border, the White House moved to identify and freeze the assets of three Mexican cartels. *See* Spencer S. Hsu, *Obama Targets Mexican Cartels*, Wash. Post, Apr. 16, 2009. Forfeiture was also used after September 11, 2001 to freeze the assets of suspected terrorists, *see* Mike Allen & Paul Blustein, *Bush Moves to Cut Terrorists' Support*, Wash. Post, Sept. 25, 2001, at A1, and to freeze Bernie Madoff's assets. *See* Charles A. Intriago & Robert A. Butterworth, *Fund Government with Dirty Money*, N.Y. Times, Apr. 27, 2009.

[3] The Domestic Highway Interdiction Program, for example, is coordinated by state and local authorities who patrol the highways of 48 States in partnership with federal and Canadian law enforcement agencies. *See* Office of National Drug Control Policy, *2009 Annual Report*, *supra*, at 24. Through mid-2008, the program had seized $600 million dollars in narcotics and investigated over 160 trafficking organizations. *Id.*

investigations and seizures—and to maximize and enhance law enforcement resources—federal agencies may adopt state forfeiture actions and share equitably in the criminal proceeds. *See* 21 U.S.C. § 881(e)(1)(A) (authorizing equitable sharing); U.S. Dep't of Treasury, *Guide to Equitable Sharing for Foreign Countries and Federal, State, and Local Law Enforcement* (2004).

2. *Modern civil forfeiture law.* While forfeiture has a lineage extending through English common law and beyond, modern forfeiture laws were enacted in the 1970s to address the growing threat posed by organized crime. *See* Howard E. Williams, Asset Forfeiture: A Law Enforcement Perspective 11 (2002). In particular, the Racketeer Influenced and Corrupt Organization (RICO) and Continuing Criminal Enterprise (CCE) laws enabled the Federal Government to seize and institute forfeiture against property used in specified offenses, as well as the proceeds and property acquired through those offenses. *See Caplin & Drysdale v. United States*, 491 U.S. 617, 630 (1989) (identifying the purpose of RICO to "lessen the economic power of organized crime and drug enterprises"); *see also United States v. Ursery*, 518 U.S. 267, 284 (1996) (forfeiture laws "are designed primarily to confiscate property used in violation of the law, and to require disgorgement of the fruits of illegal conduct").

Subsequent federal laws authorized civil forfeiture of the proceeds of narcotics trafficking. The States soon followed, many—including Illinois—modeling their forfeiture laws after the federal drug forfeiture statute, 21 U.S.C. § 881. *See* Dee Edgeworth, Asset Forfeiture: Practice and Procedure in State and Federal Courts 30-31 (2008).

In 2000, Congress passed the Civil Asset Forfeiture Reform Act (CAFRA) "[t]o provide a more just and uniform procedure for Federal civil forfeitures." 18 U.S.C. § 981. Under CAFRA, the Federal Government has 60 days to send written notice to interest holders. *Id.* § 983(a)(1)(A)(i). There are exceptions which reflect the necessity of longer time periods: in cases where state or local law enforcement has turned a case over to the Federal Government for adoption, notice may be sent 90 days from the date of seizure, *id.* § 983(a)(1)(A)(iv), and when the identity of an interest holder is not determined until after a seizure, notice may be sent 60 days after identity is determined. *Id.* § 983(a)(1)(A)(v). Moreover, a supervisory official may extend the time for sending notice by 30 days, and, upon motion to a court, by 60 days, if sending earlier notice would have an "adverse result"—*e.g.*, "endangering the life or physical safety of an individual," "intimidation of potential witnesses," and "otherwise seriously jeopardizing an investigation or unduly delaying a trial." *Id.* § 983(B)-(D)(v).

If a property owner files a claim to recover property, then the Federal Government has 90 days to file a complaint for forfeiture. *Id.* § 983(a)(2)-(3). This time period may also be extended by a district court for "good cause." *Id.* § 983(a)(3)(A).

3. *Illinois' Drug Asset Forfeiture Act.* Illinois adopted its Drug Asset Forfeiture Procedure Act (DAFPA) in 1990 to govern proceedings for forfeitable property under its Controlled Substances Act, Cannabis Control Act, and Methamphetamine Control and Community Protection Act. *See* 725 Ill. Comp. Stat. 150/5.

DAFPA, like many state forfeiture laws, reflects federal policy and law. In its statement of legislative purpose, the Illinois General Assembly stated that the law would "have a significant beneficial effect in deterring the rising incidence of the abuse and trafficking of such substances within this State." 725 Ill. Comp. Stat. 150/2. It also noted that because the federal statute upon which DAFPA was based "has been very successful in deterring the use and distribution of controlled substances within this State and throughout the country," it intended that DAFPA "be construed in light of the federal forfeiture provisions contained in 21 U.S.C. 881." *Id.*

SUMMARY OF ARGUMENT

Contrary to the holding of the court below, DAFPA's time limits are not facially unconstitutional. This is because the determination of what process is due in a forfeiture case is fact-specific and not subject to categorical temporal rules. And this is true under both *United States v. $8,850*—in which the Court squarely held that due process determinations in civil forfeiture cases are to be made pursuant to the test of *Barker v. Wingo*—and *Mathews v. Eldridge*, the precedent incorrectly applied by the court below to facially invalidate DAFPA.

There is no basis in the Due Process Clause for judicially drawn bright lines. As this Court has repeatedly held, "the drawing of lines," temporal or otherwise, "is a peculiarly legislative task." *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 314 (1976). Because Due Process rights resist quantification, this Court is reluctant to invalidate legislatively determined deadlines. Only rarely has the Court set categorical time limits that would require

wholesale displacement of the procedures crafted by state legislatures.

Because of its close resemblance to determining the timeliness of criminal trials, this Court has already recognized *Barker* as the governing framework for determining the timeliness of initiating forfeiture proceedings. *Barker*, a four-factor balancing test, is necessarily fact-specific and does not warrant the categorical invalidation of DAFPA.

Moreover, a due process analysis under *Eldridge* is likewise fact-specific. When it facially invalidated DAFPA, the court of appeals did not consider the extent to which private interests can vary from case to case. While acknowledging that DAFPA authorizes the forfeiture of "vehicles, aircraft, vessels, [and] money involved in certain drug crimes," Pet. App. 2, the court focused its analysis on the potential impact on an individual of the seizure of a car. It thus disregarded the fact that items seized under drug forfeiture laws also include jewelry, weapons, and drug paraphernalia.

The court of appeals also ignored the State's compelling interests in forfeiture, which include both its value as a law enforcement mechanism and the State's need for adequate time to conduct an investigation, evaluate the property, and decide whether to initiate forfeiture. "Both the Government and the claimant have an interest in a rule that allows the Government some time to investigate the situation in order to determine whether the facts entitle the Government to forfeiture so that, if not, the Government may return the [property] without formal proceedings." *United States v. $8,850*, 461 U.S. 555, 566 (1983).

ARGUMENT

DAFPA IS NOT FACIALLY UNCONSTITUTIONAL FOR NOT PROVIDING A PRELIMINARY POSTSEIZURE HEARING.

A statute is not facially invalid unless "no set of circumstances exists under which the [law] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987); *cf. Washington v. Glucksberg*, 521 U.S. 702, 739-40 & n.7 (1997) (Stevens, J., concurring) (a statute is not facially invalid if it has a "plainly legitimate sweep"). Because the determination of what process is due in a forfeiture case is fact-specific and not amenable to *per se* temporal distinctions, the court of appeals' holding that DAFPA is facially unconstitutional should be reversed. Both the tests of *Barker v. Wingo*, 407 U.S. 514 (1972) and *Mathews v. Eldridge*, 424 U.S. 319 (1976) typically involve case-by-case application and so neither supports facial invalidation of Illinois' deadlines.

A. State Legislatures, Not Courts, Should Set Time Limits for Civil Forfeiture Proceedings.

This Court has long held that because "there is no obvious bright line dictating when a postseizure hearing must occur," *United States v. $8,850*, 461 U.S. 555, 562 (1983), judicial determinations must be done on a case-by-case basis. The Due Process Clause "draws no bright lines around three-day, 10-day or 50-day deprivations of property," *Connecticut v. Doehr*, 501 U.S. 1, 15 (1991), and even "[a] 9-month adjudication is not . . . unconstitutionally lengthy *per se*." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 547 (1985). This is because "due

process is flexible and calls for such procedural protections as the particular situation demands." *Morissey v. Brewer*, 408 U.S. 471, 481 (1972); *Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, 367 U.S. 886, 895 (1961) (due process, "unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances").

By contrast, "the drawing of lines . . . is a peculiarly legislative task," *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 314 (1976), and "[m]aking distinctions in a murky constitutional context, or where line-drawing is inherently complex, may call for a 'far more serious invasion of the legislative domain' than [the Court] ought to undertake." *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 330 (2006). This is especially true when drawing temporal distinctions. Because due process rights resist quantification, this Court is reluctant to invalidate legislatively-set time limits. *See FDIC v. Mallen*, 486 U.S. 230 (1988); *see also Yakus v. United States*, 321 U.S. 414 (1944); *Opp Cotton Mills, Inc. v. Adm'r*, 312 U.S. 126 (1941); *Phillips v. Comm'r*, 283 U.S. 589 (1931); *Wick v. Chelan Electric Co.*, 280 U.S. 108 (1929); *Campbell v. City of Olney*, 262 U.S. 352 (1923); *Bellingham Bay & British Columbia R.R. Co. v. New Whatcom*, 172 U.S. 314 (1899).

Very rarely has the Court set bright-line time limits that would require wholesale displacement of state procedures. One example is *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975), in which the Court held that arrestees must be afforded judicial hearings on probable cause promptly following the "administrative steps incident to arrest"; subsequently, in *County of Riverside v. McLaughlin*, the Court determined

that 48 hours was the outer time limit within which the hearing must be held. 500 U.S. 44 (1991).

Rather than supporting affirmance, *Gerstein* and *Riverside* only reveal that the constitutional grounding for drawing a line in those cases is absent in civil forfeiture. Not only are those cases governed by the Fourth Amendment, but the line drawn in that context is derived from the law of arrest, in which the historical practice of holding prompt hearings to test the validity of detention reflects the special exigency of wrongly depriving persons of liberty. *See Gerstein*, 420 U.S. at 111-15; *Riverside*, 500 U.S. at 56-57 (48-hour limit contemplates time required to complete "administrative steps incident to arrest," as required by common-law practice); *id.* at 61-62 (Scalia, J., dissenting) (describing common law of arrest and collecting citations). The history of forfeiture, traditionally deferential to the government's authority,[4] differs from arrest and contains no support for similar procedural line-drawing. *See $8,850*, 461 U.S. at 565 n.14 (the "loss of liberty . . . may well be more grievous than the deprivation of one's use of property" in forfeiture proceedings).

Despite having no constitutional basis for distinguishing between time periods that comport with due process and those that do not, the court of appeals engaged in line-drawing properly reserved to the legislature. Of all the state drug forfeiture laws that specify time limits for filing forfeiture actions, only a handful incorporate *ex parte* proceedings that resem-

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[4] *See, e.g., Bennis v. Michigan*, 516 U.S. 442 (1996); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974); *J.W. Goldsmith, Jr.-Grant Co. v. United States*, 254 U.S. 505 (1921); *The Palmyra*, 25 U.S. (Wheat.) 1 (1827); *see also* Pet. Br. 29-41.

ble *Gerstein* hearings[5] and none mandate adversarial hearings by the 10-day limit urged by respondents.[6] Consequently, absent reversal, the judgment below could lead to judicial scrutiny of many other state forfeiture laws and the federal statute.

B. The Proper Test for the Timeliness of Forfeiture Proceedings Is Contained in *Barker v. Wingo*, Which Requires Case-by-Case Adjudication.

Consistent with the varying demands of due process, this Court has already determined that the timeliness of forfeiture proceedings is properly assessed by the balancing test of *Barker v. Wingo*. As the Court explained in *$8,850*, the concern that property has been deprived without a prompt hearing "mirrors the concern of undue delay encompassed in the right to a speedy trial." *$8,850*, 461 U.S. at 564; *see also United States v. Von Neumann*, 474 U.S. 242 (1986). The *Barker* test, which "necessarily compels courts to approach speedy trial cases on an *ad hoc* basis," *id.*, thus mandates the same for determining the timeliness of civil forfeiture proceedings.

[5] *See* La. Rev. Stat. § 40:2606 (police who seize property without a warrant must apply for a warrant within 72 hours of seizure in an *ex parte* application to a judge demonstrating probable cause); Tenn. Code Ann. § 40-33-204 (prerequisite to a forfeiture proceeding is an *ex parte* application to the court, within 5 days of seizure, for a forfeiture warrant which establishes probable cause).

[6] More than 40 States and the District of Columbia have drug forfeiture laws specifying time limits for the institution of forfeiture proceedings or hearings, ranging from 14 days to a year, though some States place the burden on the owner to first make a claim for the property. *See* Appendix.

In adopting the *Barker* test to assess due process challenges to civil forfeiture proceedings, the Court recognized the infeasibility of specifying time limits to mark the point at which due process rights have been denied. The Court observed in *Barker* itself that such a bright-line rule

> would require this Court to engage in legislative or rulemaking activity . . . . We do not establish procedural rules for the States, except when mandated by the Constitution. We find no constitutional basis for holding that the speedy trial right can be quantified into a specified number of days or months. The States, of course, are free to prescribe a reasonable period consistent with constitutional standards, but our approach must be less precise.

Barker, 407 U.S. at 523. Just as the States and the Federal Government have enacted procedural rules which more narrowly define the right to a speedy trial, so have they enacted specific deadlines for the State to institute forfeiture proceedings. In both instances, the function of line-drawing is squarely within the competence of the political branches.

It is therefore no surprise that in the speedy trial context courts have not invalidated speedy trial laws, but routinely entertain both constitutional and statutory claims. *See, e.g.*, *United States v. Knight*, 2009 U.S. App. LEXIS 6594 (11th Cir. Mar. 25, 2009); *United States v. Williams*, 557 F.3d 943 (8th Cir. 2009). Because legislative speedy trial limits are generally well within the period of delay required to trigger a *Barker* claim,[7] "it will be an unusual case in

[7] The length of time required to trigger a *Barker* speedy-trial analysis is roughly one year. *See United States v. Doggett*, 505

which the time limits of the Speedy Trial Act have been met but the Sixth Amendment right to speedy trial has been violated." *United States v. O'Dell*, 247 F.3d 655, 667 (6th Cir. 2001). Nonetheless, government compliance with the statute does not preclude a defendant from raising Sixth Amendment claims. *Cf. United States v. Dessesaure*, 556 F.3d 83, 85 (1st Cir. 2009) (where indictment was dismissed without prejudice for violation of Speedy Trial Act, Sixth Amendment claim could be viable if defendant were re-indicted). Similarly, if a plaintiff contesting a seizure of property were to raise a due process claim alongside a statutory claim, even a meritorious constitutional claim would not require invalidating the statutory limit altogether.

C. The Court of Appeals Erroneously Applied *Mathews v. Eldridge*, Which Also Requires Case-by-Case Adjudication.

Not only did the court of appeals fail to apply the correct legal test without the benefit of a factual record, its judgment should be reversed for two other reasons. First, *Eldridge*, like *Barker*, must be applied on a case-by-case basis. Second, proper consideration of the public and private interests identified by the Court in *Eldridge* reinforce the conclusion that DAFPA's time limits are not facially invalid.[8]

U.S. 647, 652 n.1 (1992). Lower courts which have applied *$8,850* to the timeliness of forfeiture proceedings have upheld similar delays. *See United States v. Turner*, 933 F.2d 240 (4th Cir. 1991) (16-month delay).

[8] Though *$8,850* and *Von Neumann* squarely support the application of *Barker* to assess delays in forfeiture proceedings, the Court has applied *Eldridge* to cases involving the timeliness of other post-deprivation hearings. *See, e.g., City of Los Angeles*

The fact-bound balancing of *Eldridge* factors is well-illustrated by *Lassiter v. Dep't of Soc. Servs.*, in which the Court recognized that *Eldridge* did not compel a categorical rule requiring courts to appoint counsel for indigents during parental termination proceedings. 452 U.S. 18, 31-32 (1981). The Court observed that "[i]f, in a given case, the parent's interests were at their strongest, the State's interests were at their weakest, and the risks of error were at their peak, it could not be said that . . . due process did not therefore require the appointment of counsel." *Id.* at 31. But because "the *Eldridge* factors will not always be so distributed, and since due process is not so rigid," the Court declined to mandate appointed counsel in every case. *Id.* at 31-32.

The Court has similarly applied *Eldridge* in evaluating challenges to the timeliness of post-deprivation hearings. In *FDIC v. Mallen*, the Court considered the constitutionality of procedures allowing a suspended bank official to obtain a post-suspension hearing before the FDIC. 486 U.S. at 231. The federal statute in that case directed the FDIC to hold a hearing within 30 days of a notice of suspension and to issue a decision within 90 days. *See id.* at 244. In concluding that the statute was "not unconstitutional *on its face*," *see id.* at 248 (emphasis added), the Court observed that "the 90-day period is not so long that it will always violate due process. In many cases, perhaps most, it will be justified by an important government interest coupled

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v. David, 538 U.S. 715 (2003) (timeliness of hearing to contest a fine); *Mallen*, 486 U.S. at 230 (timeliness of hearing to contest job suspension); *Barry v. Barchi*, 443 U.S. 55 (1979) (timeliness of hearing to contest suspension of horse license).

with factors minimizing the risk of an erroneous deprivation."[9] *Id.* at 244. *Cf. Barry v. Barchi*, 443 U.S. 55, 66 (1979) (state provision unconstitutional on its face for failing to specify time limits that ensured plaintiffs the opportunity to be heard before "suffer[ing] the full penalty imposed" by license suspension); *Goss v. Lopez*, 419 U.S. 565, 581 (1975).

The Court's guidance in *Mallen* underscores the fact-specific nature of the *Eldridge* inquiry. In assessing the timeliness of a post-suspension hearing, the Court explained, "it is appropriate to examine the importance of the private interest and the harm to this interest occasioned by the delay; the justification offered by the Government for delay and its relation to the underlying governmental interest; and the likelihood that the interim decision may have been mistaken." *Mallen*, 486 U.S. at 242.

Even if the *Eldridge* test were applicable to civil forfeitures, the court of appeals committed reversible error by using it to issue a categorical rule of procedure. In doing so, the court did not recognize the varying range of private interests that may be affected by forfeiture; nor did it give hardly any weight to the State's interest in its civil forfeiture proceedings. This error is manifest from a general assessment of the competing private and public interests implicated by DAFPA.

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[9] Lower courts have upheld much longer delays. *See e.g.*, *Jones v. City of Gary*, 57 F.3d 1435 (7th Cir. 1995) (three and six-month delays in receiving post-suspension hearing did not violate due process); *DeVito v. Chicago Park Dist.*, 972 F.2d 851 (7th Cir. 1992) (one-year delay, same).

1. The private interest will differ in each case.

In civil forfeiture cases, the private interests at stake will obviously vary according to the nature of property seized.[10] In one survey of federal and local agencies, cash, cars, boats, planes, jewelry, and weapons comprised 95% of all property seizures, but among "more unusual items" were kangaroos, gymnastic equipment, Kruggerands, and pill machines. G. Patrick Gallagher, Bureau of Justice Assistance, U.S. Dep't of Justice, *Asset Forfeiture: The Management and Disposition of Seized Assets* (1988). Yet the court below ignored the reality that some deprivations of property will be substantially less serious than others in holding that "*anyone* . . . who has been deprived of property" is entitled to an earlier hearing. Pet. App. 10 (emphasis added).

Because the deprivation of property will generally cause less hardship than the loss of a job, it would be irrational to require comparable or greater procedural protections for the seizure of property than what the Court upheld in *Mallen* to protect the suspension of a person's livelihood. *See $8,850*, 461 U.S. at 565 n.14 (noting that a loss of liberty is likely to be "more grievous" than property deprivation). Indeed, some property deprivations are *de minimis*. For example, after applying *Eldridge* to a 27-day delay in receiving a hearing, the Court considered a $134.50 fine, incurred when a plaintiff recovered his car from an impound lot, to be overwhelmed by the city's in-

[10] Even *Krimstock v. Kelly*, 306 F.3d 40 (2d Cir. 2002), upon which the court of appeals relied in this case, considered only the seizure of cars under a New York City ordinance, and limited its ruling to relief on that basis.

terest in administrative necessity. *David*, 538 U.S. at 716-18.

Though the monetary value of property is significant in evaluating the harm occasioned by delay (as in *David*), it is not controlling: the harm resulting from the seizure of a personal jet, for example, may be less severe than that resulting from the seizure of another person's only car. In short, the severity of the harm suffered is determined by the circumstances. *See, e.g.*, *Eldridge*, 424 U.S. at 340 (observing distinction between benefits "not based upon financial need and welfare "given to persons on the very margin of subsistence); *accord Bennis*, 516 U.S. at 457-58 (Ginsburg, J., concurring) (noting that the Bennises owned more than one car). And though the court below focused on the severity of the deprivation effected by the seizure of cars, the generalization that our society is "highly dependent on the automobile," Pet. App. 8, says nothing about the particular hardship the plaintiffs suffered in this case,[11] and ignores the fact that assets subject to seizure under DAFPA include far more than cars and cash.

2. The State has strong interests in seizing forfeitable property and having sufficient time to assess whether it should be forfeited.

On the other side of the ledger, Illinois possesses a variety of interests that were given no consideration by the court below. These interests were ac-

[11] The court of appeals also emphasized the hardship that the seizure of a car would have on innocent owners. Pet. App. 8. Because of the lack of a factual record, it is unclear whether any of the plaintiffs in this case are innocent owners; the fact that some of them had their criminal charges dropped, or had not been charged, does not demonstrate actual innocence.

counted for, however, in the legislative balancing that produced DAFPA.

All 50 States and the federal government utilize forfeiture as a "time-honored method to prevent illegal activity." *General Motors Acceptance Corp. v. United States*, 286 U.S. 49 (1932). And in particular, drug forfeiture laws like DAFPA provide the State with the critical ability to disrupt the organized drug trade by attacking its infrastructure. *See* Howard E. Williams, Asset Forfeiture: A Law Enforcement Perspective 11-12, 22 (2002). When enacting DAFPA, the Illinois General Assembly found that civil forfeiture would "have a significant beneficial effect in deterring the rising incidence of the abuse and trafficking of [controlled] substances within this State." 725 Ill. Comp. Stat. 150/2.

In furtherance of this legislative purpose, DAFPA provides the police with 52 days to decide whether to refer the seizure of property to the State's Attorney for review. *Id.* § 150/5. This initial period enables the police to conduct an investigation in which the property can be appraised and ownership ascertained, along with any encumbrances or liens. And because sophisticated criminal enterprises often hide their assets through elaborate financial mechanisms, "law enforcement agencies face major barriers in detecting and identifying the real ownership and sources of investment." Frank R. Booth, Bureau of Justice Assistance, U.S. Dep't of Justice, *Asset Forfeiture: Public Record and Other Information on Hidden Assets* (1988); *see also* Williams, Asset Forfeiture: A Law Enforcement Perspective, *supra*, at 224 ("Complex forfeiture cases often require the investigator to unravel complicated financial schemes."); *see also* 18 U.S.C. § 983(a)(1)(A)(v) (allowing an exten-

sion of time for providing notice where the identity of the owner cannot be ascertained).

Moreover, though many law enforcement agencies engage in "pre-seizure planning," sometimes police officers "must decide whether to seize property before all the facts of the case are available." Williams, Asset Forfeiture: A Law Enforcement Perspective, *supra*, at 223. Once the asset is seized, however, the burden falls on law enforcement agencies to hire contractors for appraisal and to store and manage the seized asset to preserve its value. *See id.* at 246-256; Gallagher, *Asset Forfeiture: The Management and Disposition of Seized Assets*, *supra*. Because of resource constraints, smaller seizing agencies with fewer resources may decide to turn over a forfeiture case to federal authorities. *See State v. Gray*, 21 S.W.3d 847, 851 (Mo. App. 2000). Federal guidelines give state and local agencies 30 days to make this decision. Dep't of Treasury, *Guide to Equitable Sharing*, *supra*, at 7.

A postseizure investigation may elicit facts that result in the release of property. For example, it may indicate that the property was not used in violation of the law, or that the person whose property was seized was an innocent owner. *See* 725 Ill. Comp. Stat. 150/8 (innocent owner exception); *see also* 28 C.F.R. § 8.6 (authorizing the agent in charge to "quick release" property if the owner is innocent or when release "would be in the best interest of justice and the Government"). Additionally, if the property is appraised below a threshold value, it may be returned because it is a financial liability to the State. *See* Williams, Asset Forfeiture: A Law Enforcement Perspective, *supra*, at 244 (listing U.S. Department of Justice minimum threshold value guidelines);

Dep't of Treasury, *Guide to Equitable Sharing*, *supra*, at 8. Conversely, because of the close connection between civil forfeiture actions and criminal proceedings, the postseizure investigation may reveal links to other criminal investigations or leads to other persons or property that may be involved in criminal activity.

The State's Attorney has 45 days to decide whether to file forfeiture proceedings once she is notified of a property seizure by the police. 725 Ill. Comp. Stat. 150/6. During this time, the prosecuting attorney must review the facts of the case and decide whether probable cause for forfeiture exists, and if it does, whether it is worthwhile to pursue forfeiture. This period also provides sufficient time to allow the prosecuting attorney to informally resolve claims. *See infra* page 24. Subsequently, if the attorney decides to initiate forfeiture, then depending on the value of the property the prosecutor is either required to initiate proceedings by filing a verified complaint, 725 Ill. Comp. Stat. 150/9 (for property exceeding $20,000), or send notice to all interest holders. *Id.* § 150/6(A) (for property less $20,000). In either event, these time periods are reasonable for the preparation of a legal case.

The decision to pursue forfeiture "is made by a publicly accountable prosecutor subject to budgetary considerations and under an ethical obligation, not only to win . . . but also to serve the cause of justice." *Cheney v. United States Dist. Court*, 542 U.S. 367, 386 (2004). Consequently, as in *Mallen*, there is a public interest "in a correct decision [that] counsels . . . against any constitutional imperative that might require overly hasty decisionmaking." *Mallen*, 486 U.S. at 243. Because the decision "is a serious one"

that "may involve complex issues," *id.* at 244, a prosecutor will be less likely to seek forfeiture in certain cases if she is able to make a considered decision following an investigation. *Cf. $8,850*, 461 U.S. at 566 ("[D]elay can favor both the claimant and the Government."). The interest in decisional accuracy likewise applies to the judge hearing the merits of the forfeiture case. A hearing that is held too early risks prejudicing the interests of both the State and the property owner.

D. DAFPA Satisfies Due Process.

DAFPA fulfills the essential mandate of due process—providing a meaningful opportunity to be heard "at some time before a State finally deprives a person of his property interests." *Parratt v. Taylor*, 451 U.S. 527, 540 (1981). Due process does not require *in addition*, as the court of appeals envisioned, some other "mechanism to promptly test the validity of the seizure" or "some . . . mechanism to test the validity of the retention."[12] Pet. App. 7, 10. These mechanisms would either duplicate the purpose of the forfeiture hearing or else are irrelevant to the due process analysis.

In *$8,850*, the Court noted the existence of interim avenues of relief under federal law. These include the filing of an equitable action compelling the

[12] To the extent that "the speed with which the civil forfeiture proceeding itself is begun" is "a different question" from "whether there should be some mechanism to promptly test the validity of the seizure," Pet. App. 7, the latter question is not contemplated by this Court's due process jurisprudence. Moreover, the validity of *seizure* already may be tested under 725 Ill. Comp. Stat. 5/114-12 ("A defendant aggrieved by an unlawful search and seizure may move the court for the return of property.").

filing of a forfeiture action or return of seized property, informally asking the seizing agency to refer the matter to a prosecuting attorney, and filing a motion under the Federal Rules of Criminal Procedure for a return of the property. *See $8,850*, 461 U.S. at 569. The option to file a petition for remission also furnished an additional means of expediting the return of property by administrative review. *See Von Neumann*, 474 U.S. at 249 n.8. None of these options were material to the speed of the forfeiture proceedings, however. Even though property owners utilized remission in 90% of customs seizure cases, the Court explained in *Von Neumann* that "[i]mplicit in this Court's discussion of timeliness in *$8,850* was the view that the forfeiture proceeding, without more, provides the postseizure hearing required by due process to protect Von Neumann's property interest in the car." *Id.* at 249 & n.8.

Just as "remission proceedings are not *necessary* to a forfeiture determination, and therefore are not constitutionally required," *id.* at 250, other mechanisms that would afford interim relief are not constitutionally necessary, even though other remedies are in fact available in Illinois and the other States. *See* Pet. Br. 60-65 (citing caselaw and statutes); Edgeworth, Asset Forfeiture: Practice and Procedure, *supra*, at 58, 72-73 & tbl. 4-1, 100 (describing remedial mechanisms of bond, petition for remission, and hardship provision).

Indeed, as petitioner describes, it is the practice of the State's Attorney to give property owners notice that attorneys in her office are available to discuss the return of property; "meetings frequently occur, and as a result, the State's Attorney either settles or rescinds the majority of the administrative forfeiture

cases." Pet. Br. 64 n.6; Pet. 13. Like remission proceedings, this avenue conserves judicial resources and "suppl[ies] both the Government and the claimant a way to resolve a dispute informally rather than in judicial forfeiture proceedings." *Von Neumann*, 474 U.S. at 250; *see $8,850*, 461 U.S. at 565-66.

For this reason, the court of appeals disregarded the teachings of *$8,850* and *Von Neumann* in remanding to the trial court to "see whether a bond or an order can be fashioned to allow the legitimate use of the property while the forfeiture proceeding is pending." Pet. App. 10. While such remedies may be sensible as a matter of policy, it is for the legislature and not the courts to implement.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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MAY 2009

APPENDIX

APPENDIX

State Statutory Time Limits for the Initiation of Forfeiture Proceedings

Alaska Stat. § 17.30.116(a)

Notice of pending forfeiture action must be given within 20 days of seizure.

Ariz. Rev. Stat. §§ 13-4308B, -4311D

Prosecuting attorney must file within 60 days of seizure; interest holder may file a property claim within 30 days of notice of seizure.

Ark. Code Ann. § 5-64-505(g)(2)(A)

Prosecuting attorney must file within 60 days of receiving report from police.

Cal. Health & Safety Code §§ 11488.2, 11488.4

Police must refer seized property to prosecuting attorney within 15 days, and attorney must file "as soon as practicable" or within one year, but claimants may move for return of property.

Col. Rev. Stat. § 16-13-505(2)(a)

Prosecuting attorney must file within 60 days of seizure unless he can show "good cause" for filing later.

Conn. Gen. Stat. § 54-36h

Prosecuting attorney must file within 90 days of seizure.

Del. Code Ann. § 4784(j)

Seized property automatically forfeited to the State unless claimant petitions the court within 45 days of notice.

D.C. Code § 48-905.02

Interest holder has 30 days from notice of seizure to file a claim.

Fla. Stat. Ann. § 932.703(2)(a)

If requested, hearing must be held 30 days after seizure "or as soon as practicable thereafter."

Ga. Code Ann. § 16.13-49

Police must report seized property to prosecuting attorney within 20 days, and attorney must file within 60 days of seizure.

Haw. Rev. Stat. § 712A-10

Interest holder must file claim or petition for remission within 30 days of notice of seizure; prosecuting attorney has 45 days from receipt of notice of the claim filing to pursue forfeiture action or 60 days to rule on petition for remission.

Idaho Code Ann. § 37-2744

Prosecuting attorney must file within 30 days of notice.

725 Ill. Comp. Stat. 150/5, 150/6, 150/9

Police must refer property seizure to prosecuting attorney within 52 days; if property is worth more than $20,000, prosecuting attorney must file within 45 days of receiving notice, and if worth less, within 90 days.

Ind. Code Ann. § 34-24-1-3

Prosecuting attorney must file within 180 days of seizure or 90 days from receiving written demand from claimant.

Iowa Code Ann. § 809A.8

Prosecuting attorney must issue notice of pending forfeiture within 90 days of seizure, and file a judicial action 90 days after issuing notice of pending forfeiture; if interest holder claims exemption, prosecuting attorney may delay filing judicial action for 180 days.

Kan. Stat. Ann. § 60-4107

Police must notify interest holders within 30 days of seizure and notify prosecuting attorney within 45 days; prosecuting attorney has 15 days from receiving notice to file.

La. Rev. Stat. § 40:1611

Owner may petition the court within 10 days of warrantless seizure of property and obtain a hearing within 30 days of the court's "show cause" order.

Me. Rev. Stat. Ann. §§ 5822-5823

No specified time limits except for vehicle seizures, in which case police must report such seizure to a prosecuting attorney within 21 days, and the prosecuting attorney must file forfeiture petition within 21 days of report.

Md. Code Ann. § 12-304(a)-(c)

Prosecuting attorney must file within 90 days of seizure, or if a vehicle is seized, within 45 days.

Mass. Gen. Laws ch. 94, § 47(d)

No specified time limits for filing, but upon filing a court will order notice sent to owners and must hold a hearing within 2 weeks of notice.

Mich. Comp. Laws § 333.7523(1)(c)-(d)

Property owner must file a claim and post bond within 20 days of seizure or else the property is forfeited.

Minn. Stat. Ann. § 609.5314

Notice must be given "within a reasonable time" and a property owner must file a demand for judicial determination within 60 days of receiving notice.

Miss. Code Ann. § 41-29-177(1)

Prosecuting attorney must file within 30 days of seizure.

Mo. Rev. Stat. § 513.607

Police must notify prosecuting attorney within 4 days of seizure, and prosecuting attorney must file proceeding within 10 days of receipt of notice.

Mont. Code Ann. § 44-12-201

Police officer must file within 45 days of seizure.

Neb. Rev. Stat. § 28-431(4)

Police officer must file within 10 days of seizure, and a hearing must be held between 30 and 90 days after seizure.

Nev. Rev. Stat. § 79.1171

Police officer must file within 60 days of seizure.

N.H. Rev. Stat. Ann. § 318-B:17-b(II)

Police must send notice within 7 days of seizure, and prosecuting attorney must file within 60 days of seizure.

N.J. Rev. Stat. § 2C:64-1

Prosecuting attorney must file within 90 days of seizure.

N.M. Stat. Ann. § 31-27-5

Prosecuting attorney must file within 30 days of seizure.

N.C. Gen. Stat. § 75D-5(f)

Prosecuting attorney must file within 30 days of receiving notice of seizure from police.

Or. Rev. Stat. §§ 475A-055, -075

Police must provide notice within 15 of seizure, property owners may file a claim within 21 days of receiving notice, and a prosecuting attorney must file within 15 days of receiving the claim or within 30 days of seizure.

R.I. Gen. Laws § 21-28-5.04.2

Police must report seizure to a prosecuting attorney within 30 days of seizure; if property is worth more than $20,000, the prosecuting attorney must file within 20 days of receiving the report.

S.D. Codified Laws §§ 34-20B-76, -84 to -86

In cases of warrantless seizure, prosecuting attorney must file within 30 days of seizure.

Tenn. Code Ann. §§ 40-33-107, -206, -207

Owner must file a claim within 30 days of receiving notice and a court will schedule a hearing date with-

in 30 days of the claim, but that hearing date is not mandatory; for vehicles, owners may file claim within 15 days of receiving notice and a court will schedule a hearing date within 45 days of the claim.

Tex. Code Crim Proc. Ann. art 59.04(a)

Prosecuting attorney must file within 30 days of seizure.

Utah Code Ann. § 24-1-4

Prosecuting attorney must file within 60 days of seizure.

Vt. Stat. Ann. § 4243(a)

Prosecuting attorney must file within 14 days of seizure.

Va. Code Ann. § 19.2-386.3

Prosecuting attorney must file within 90 days of seizure.

Wash. Rev. Code § 69.50.505(2)-(5)

Notice must be served on owner within 15 days; if owner files a claim within 45 days of notice, he "shall be afforded a reasonable opportunity to be heard."

W. Va. Code Ann. § 60A-7-705

Prosecuting attorney must file within 90 days of seizure.

Wisc. Stat. Ann. § 961.555(2)(a)

Prosecuting attorney must file within 30 days of seizure.

AMICUS CURIAE BRIEF

135

(10)

No. 08 – 351

IN THE

Supreme Court of the United States

ANITA ALVAREZ,
State's Attorney of Cook County, Illinois,

Petitioner,

v.

CHERMANE SMITH, EDMANUEL PEREZ, TYHESHA BRUNSTON, MICHELLE WALDO, KIRK YUNKER and TONY WILLIAMS,

Respondents.

On Writ of Certiorari to the United States Court of Appeals For the Seventh Circuit

BRIEF OF THE NATIONAL POLICE ACCOUNTABILITY PROJECT AS *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENTS

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TABLE OF AUTHORITIES

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Aetna Life Ins. Co. v. Lavoie,
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Bennis v. Michigan, 516 U.S. 442 (1996).....25

Boddie v. Connecticut, 401 U.S. 371 (1971).....28

Boyd v. United States, 116 U.S. 616 (1886).....27

Bracy v. Gramley, 520 U.S. 899 (1997).....24, 25

Bush v. United States, 375 F.2d 602
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Calero-Toledo v. Pearson Yacht Leasing Co.,
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Commonwealth v. Lewin,
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Gerstein v. Pugh,
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Illinois v. Gates, 462 U.S. 213 (1983).....25, 26

Johnson v. United States, 333 U.S. 10 (1948)....24, 32

Kaiser Aetna v. United States,
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Krimstock v. Kelly,
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Loretto v. Telepromter Manhattan CATV Corp.,
458 U.S. 419 (1982) 27

Mapp v. Ohio, 367 U.S. 643 (1961).....5, 7, 8, 27

Matthews v. Eldridge, 424 U.S. 319 (1976).....28, 29

McNabb v. United States, 318 U.S. 332 (1943)...25, 34

Mitchell v. T. Grant Co., 416 U.S. 600 (1974).....26

New York v. McMurty, 314 N.Y.S. 2d 194
(Crim.Ct. N.Y. 1970).....11, 12

Property Clerk v. Hyne, 147 Misc. 2d 774
(Sup. Ct. N.Y. Co. 1990).....29

Smith v. Chicago, 524 F.3d 834
(7th Cir. 2008).....6, 28, 30, 32

Soldal v. Cook County, 506 U.S. 56, (1992).....27, 30

Sniaddach v. Family Finance Corp.,
395 U.S. 337 (1969).....26, 27, 30

Tumey v. Ohio, 273 U.S. 510 (1927).....22, 24, 25

United States v. $8,850, 461 U.S. 555 (1983).....23, 31

United States v. Broomfield, 417 F.3d 654 (7th Cir. 2005) 17

United States v. James Daniel Good Real Property, 510 U.S. 43 (1993).....27, 28

United States v. Jones, 2009 U.S. Dist. LEXIS 6434, *1-2 (D. Mass. 2009).....15

United States v. Matos, 07-CR-870 (NGG), (E.D.N.Y. Sept. 23, 2008).....14

United States v. Matos, 2008 WL 5169112 (E.D.N.Y Dec. 8, 2008).....15

United States v. Petillo, 400 F.Supp. 1152 (D.C.N.J. 1975).....12, 13

United States v. Reese, 2 F.3d 870 (9th Cir. 1993).....22, 23

United States v. That Certain Real Property Located at 632636 Ninth Avenue, Calera, Alabama, 798 F.Supp. 1540 (N.D. Ala. 1992).....25

United States v. Von Neumann, 474 U.S. 242 (1986).....23, 31

Watts v. Indiana, 338 U.S. 49 (1949).....16

Withrow v. Larkin, 421 U.S. 35 (1975).....25

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Illinois Controlled Substances Act,
720 ILCS 570/505, et seq.....7

Narcotics Profits Forfeiture Act,
725 ILCS 175/5, et seq.....7

MISCELLANEOUS

N. Ahmedullah, *Lawsuits Accuse Chicago Police Officer Richard Fiorito of False DUI Arrests, Harassing Gays*, Chi. Trib., April 3, 2009, available at archives.chicagotribune.com/2009/apr/03/local/chi-cop-gay-protestapr03.....20

K. Ataiyero, *Officer Found Guilty of Rape: Judge Criticizes Court Testimony of 2 Detectives*, Chi. Trib., Dec. 11, 2007, available at archives.chicagotribune.com/2007/dec/11/news/chi-herman11dec11.....18

E. Blummenson & E. Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U.Chi.L.Rev. 35 (1998).....21, 22, 23, 24

B. Bradley, *50 DUI Cases Dropped Over Cop's Improper Procedure*, ABC News 7 Chicago, Oct. 24, 2007, available at abclocal.go.com/wls/story?section=news/local&id=5723897.....19, 20

Chicago Appleseed Fund for Justice, Criminal Justice Project, *A Report on Chicago's Felony Courts* (December 2007).....10

G. Chin & S. Wells, *The "Blue Wall of Silence" as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U.Pitt.L.Rev. (1998).....9

M. Cloud, *The Dirty Little Secret*, 43 Emory L.J. (1994).....9, 10

J. Coen, *2 Officers Held Liable in Assault: Man Stands to Get $4 Million from City*, Chi. Trib. Oct. 17, 2007, available at *archives.chicagotribune.com/2007/oct/17/news/chi-screwdriver_alloct17*.....18

Commission to Investigate Allegations of Police Corruption and the Anti-Corruption Procedures of the Police Dep't, City of New York (1994) (M. Mollen, Chair).....8, 9, 16

M. Garcia and D. Heinzmann, *Chicago and Police Officers Lose Case and $7.7 million for False Arrest*, Chi. Trib., June 12, 2008, available at archives.chicagotribune.com/2008/jun/12/local/chi-federal_jury_verdictjun13.....18

K. Hawkins, *Top Cop Jody Weis Found in Contempt of Court Over Reported Cops List*, The Huffington Post, March 4, 2009, available at http://www.huffingtonpost.com/2009/03/04/top-cop-jody-weis-found-i_n_171937.html.....20, 21

R. Hussain, *Suspended Chicago Cop Anthony Abbate Convicted of Beating Female Bartender*, Chi. Sun Times, June 2, 2009, available at suntimes.com/news/24-7/1603349,cop-anthony-abbate verdict060209.article.....17

N. Korecki and T. Fardon, *Former Chicago Cop William Cozzi Sentenced to 40 Months*, Chi. Sun Times, June 12, 2009, available at suntimes.com/news/metro/1618841,william-cozz-sentence-video-beating-061109.article.....18

N. Korecki, *Judge: I'm Tired of Crooked Cops in Chicago*, Chi. Sun Times, June 30, 2009, available at suntimes.com/news/metro/1645499,badcop-chicago-063009.article.....19

S. Mills and J. Coen, *Feds Catch Up with Burge: Notorious Ex-Chicago Commander Charged with Lying About Torture*, Chi. Trib., Oct. 22, 2008, available at chicagotribune.com/news/local/chi-burge-22-oct22,0,6553487.story.....18, 19

National Public Radio, *Scandals Bring Down Chicago's Elite Policing Unit*, October 10, 2007, available at npr.org/templates/story/story.php?storyId=15149792.....17

J. Sexton, *Jurors Question Honesty of Police*, N.Y. Times, Sept. 25, 1995, available at nytimes.com/1995/09/25/nyregion/jurors-question-honesty-of-police.html.....17

C. Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U.Colo.L.Rev. 1037 (1996)...9, 10

I. Younger, *The Perjury Routine*, The Nation (May 8, 1967).....11

No. 08 – 351

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ANITA ALVAREZ,
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CHERMANE SMITH, EDMANUEL PEREZ, TYHESHA BRUNSTON, MICHELLE WALDO, KIRK YUNKER and TONY WILLIAMS,

Respondents.

On Writ of Certiorari to the United States Court of Appeals For the Seventh Circuit

BRIEF OF THE NATIONAL POLICE ACCOUNTABILITY PROJECT AS *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENTS

INTEREST OF *AMICUS CURIAE*

The National Police Accountability Project (NPAP) was founded in 1999 by members of the

National Lawyers Guild, which was the first racially integrated national bar association.[1] NPAP was founded with the intent to end police abuse of authority and to provide support to both grassroots organizations as well as victims' organizations that combat police misconduct. Nationally, there are more than 350 NPAP members. NPAP provides training and support for attorneys and public education on issues relating to police misconduct. Amicus also supplies information and resources for non-profit and community groups who assist victims of police abuse and lends its support to legislative reforms aimed at ensuring police accountability. NPAP oversees and enables a forum for legal professionals and community organizations to meet and creatively work towards ending police misconduct.

One of the most important missions of NPAP is to promote accountability of police officers and their employers for violations of the Constitution or laws of the United States. To that end, Amicus urges affirmance of the Seventh Circuit's decision. As written, the Drug Asset Forfeiture Procedure Act, or DAFPA, gives police officers in the field unfettered

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[1] This amicus brief is filed with the consent of the parties. Petitioner has filed a letter with the Clerk of the Court consenting to the filing of amicus briefs, and respondents' letter of consent is being filed with the Clerk of the Court together with this brief, in accordance with this Court's Rule 37.3(a). No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, or its counsel, made a monetary contribution intended to fund its preparation or submission.

discretion to seize the private property of Illinois citizens without a warrant. Seizures are to be predicated on a probable cause determination by an officer that the vehicle is involved in narcotics activity. The principle constitutional infirmity of DAFPA lies in the length of time that can elapse between the initial seizure and the initiation of forfeiture proceedings. Under DAFPA, depending on the value of the car, owners can face up to 187 days before being granted an audience with a judicial body.

In the interim, there is no one to whom owners can complain; there is no way to challenge the validity of the seizure. Put another way, there is no check on the officer's decision to seize. Without judicial oversight, the officer's decision to seize stands for months or years, regardless of whether the officer properly determined probable cause. Such a statutory scheme is dangerous enough on its own, but the particularly disturbing aspect of DAFPA is that police agencies are partially funded through the seizures they make. Officers have a direct pecuniary interest in the seizure of vehicles, and this conflict of interest, codified by DAFPA, imperils the constitutional rights of Illinois citizens. Police accountability does not manifest itself, and the first – and sometimes last – line of defense against official impunity has always been the courts. Reversing the Seventh Circuit's decision that due process requires a prompt post-seizure hearing to determine the validity of seizures under DAFPA would foreclose meaningful oversight of Illinois police agencies, lead to an increase in unreasonable seizures of private property, and prohibit owners from challenging warrantless seizures. As written, DAFPA is a constitutional

vacuum – a place where cherished liberties languish or perish; so Amicus urges affirmance to fill that void with the due process protections demanded by this Nation's Constitution.

SUMMARY OF ARGUMENT

The Illinois Drug Asset Forfeiture Procedure Act, 725 ILCS 150/1 *et seq.*, (DAFPA) usurps the duty of the courts to be watchful over the security of persons and property. Instead, it gives the determination of probable cause to seize civilians' property entirely to the police officer in the field, and allows that property to be kept away from its owner for up to 187 days before judicial intervention. This Court has never abided unchecked police action. It has instructed that either before the police act or shortly thereafter, a neutral magistrate must examine the operative facts of a seizure – be they of a person or property – to ensure the state has complied with the Constitution. Petitioners would have this Court believe DAFPA contains constitutionally sufficient safeguards for citizens, but such argument ignores both an ongoing history of police misconduct and the Court's repeated conclusions that police officers in the field do not correctly ascertain the existence of probable cause.

It is improper and inadequate for police officers to be entrusted with the sole determination of probable cause. This is both because police officers lack the necessary expertise to make such determinations and because, unfortunately, some officers lie. Certainly, this Court does not entrust prosecutors with the sole determination of probable cause, let alone a beat officer. *Gerstein v. Pugh*, 420

U.S. 103 (1975). Petitioners offer no constitutionally legitimate reason to deviate from the well-reasoned principle that police officers in the field must have judicial oversight for their actions. This is especially true where, as here, the officers possess a pecuniary interest in the seizure of vehicles. Under DAFPA, the seizing agency is allocated up to 65% of the funds generated by the forfeiture. True, both good and bad officers get probable cause wrong, albeit for different reasons. However, Illinois has devised a system where all police officers have an economic incentive to seize vehicles – their budgets depend on it. This financial motivation is another basis to compel an adversary setting in which individuals can challenge the continued seizure of their property.

It falls to this Court to guard the people of Illinois against governmental encroachment of their property because Illinois has precluded adequate citizen challenges to vehicular seizures. There are numerous reasons for this Court to affirm the decision below. After an introduction to the structure of DAFPA illustrating its inherent incentive to falsely seize vehicles, Amicus makes three main arguments. First, police officers cannot be trusted to determine probable cause to seize, because some police officers lie – a fact well documented by state courts, federal courts, independent commissions and academics since this Court's decision in *Mapp v. Ohio*, 367 U.S. 643 (1961). Particular emphasis is placed on police officer perjury and false reporting, as these types of misconduct are most apropos of the misconduct incentivized by DAFPA. Second, Amicus focuses on the particular problem posed by DAFPA, namely, officers' financial incentive to contrive probable cause to seize vehicles. Finally, Amicus

argues that the Seventh Circuit's decision below, requiring a due process hearing analogous to that imagined by this Court in *Gerstein*, is the appropriate vehicle to protect the Illinois citizenry from governmental overreaching.

ARGUMENT

I. ILLINOIS' DAFPA: A CODIFIED CONFLICT OF INTEREST

The Seventh Circuit noted that DAFPA itself does not require a post-seizure determination of probable cause. *Smith v. Chicago et al,* 524 F.3d 834, 835 (7th Cir. 2008). The result: for property valued at over $20,000.00, up to 97 days can elapse between the seizing officer's determination and *the filing* of forfeiture proceedings (which do not include an actual hearing), and for vehicles worth less than $20,000.00, as many as 187 days can elapse between seizure and the institution of proceedings against the property (the time can be reduced to 142 days if the claimant acts "swiftly"). *Id.* at 835-836. The delay can be much longer, even more than a year.

It is highly problematic that a vehicle's seizure is based solely on the officer's determination of probable cause and that so much time can elapse before a person can challenge the seizure of their vehicle. Inherent in DAFPA and its enabling statutes is another grave concern compounding the problem: the seizing police agency receives funding from forfeiture proceeds under the Act.

Seizures regulated by DAFPA are affected pursuant to underlying prohibitive drug acts. DAFPA cross-references these various acts regarding

the distribution of profits from the seized property. If the property is seized pursuant to the State's Cannabis Control Act, Controlled Substance Act, or Methamphetamine Control and Community Protection Act, 65% of the proceeds go to the agency responsible for the preceding investigation (*i.e.*, the officer's police department). 720 ILCS 570/505(g)(1)-(3). If property is seized and subsequently forfeited under the Narcotics Profit Forfeiture Act, 50% of proceeds are distributed to the local agency responsible for the underlying investigation. 725 ILCS 175/5(g)(1)-(3).

Under DAFPA, the time limits, lack of meaningful oversight, and inherent incentives are crucial factors for this Court's constitutional review. DAFPA is a law with no meaningful opportunity to challenge the warrantless seizure of private property for six plus months, a law that allows a police officer's determination of probable cause to stand for that same six plus months, a law that ignores innocent vehicle owners, and a law that rewards police agencies financially the more vehicles they seize. With these considerations in mind, Amicus turns now to the ongoing history of police misconduct to evidence the constitutional infirmities of DAFPA.

II. POLICE OFFICER MISCONDUCT IS WELL DOCUMENTED AND CANNOT BE IGNORED WHEN EXAMINING DAFPA

The Court has long recognized that (some) police officers lie or, at a minimum, cannot be trusted to get constitutional law right. For example, in *Mapp*, this Court intuited that the officers fabricated the existence of the search warrant given that no

warrant was produced at the underlying criminal trial – a peculiar absence that was not accounted for by prosecutors. *Mapp*, 367 U.S. at 645. Since *Mapp*, courts, writers, academics, and commissions have documented that police officers make various efforts to ensure evidence will be admissible – regardless, at times, of the legality of their actions. The reasons underlying such official misconduct are as voluminous as the sources that document it. Amicus intends to show the Court that police officers are not reliable sources of probable cause determinations. The synopsis that follows is a representative portion of documented misconduct in its various forms since *Mapp*.

A. CALLING THINGS BY THEIR RIGHT NAME: THE GENESIS OF TESTILYING AND ITS PROGENY

Although not the first of its kind, perhaps the best-known commission to investigate allegations of widespread police misconduct convened in New York City in the mid-1990s. Commission to Investigate Allegations of Police Corruption and the Anti-Corruption Procedures of the Police Dep't, City of New York (1994) (Milton Mollen, Chair) [hereinafter cited as Mollen Commission]. A principal finding of the Mollen Commission was that false reporting, courtroom perjury, and documentary perjury (*e.g.*, warrant affidavits) were the most common forms of police corruption in the criminal justice system. Mollen Commission at 36. In fact, the problem was so rampant in certain New York City precincts that officers created a word for lying under oath: testilying. *Id.* Common examples of testilying

included claiming a traffic violation to justify stopping a motorist, claiming to see a bulge indicative of contraband on a person, claiming to see money exchange hands, claiming to see drugs in plain view, and inventing unidentified civilian informants. *Id.* at 38. Pointedly, in each example, police were in pursuit of drugs, guns, or both, *id.*, just as the seizures under DAFPA are related to drug arrests.

Scholars offer a variety of reasons for the existence of testilying. Some argue that police, though rarely, commit perjury to frame the innocent or, more commonly, to protect fellow officers' misconduct from being discovered – a phenomenon commonly referred to as the "code of silence" or the "blue wall of silence." G. Chin & S. Wells, *The "Blue Wall of Silence" as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U.Pitt.L.Rev. 233, 237 (1998) [hereinafter cited as Chin & Wells, *Blue Wall of Silence*]. Some postulate officers testilie to cover up their own misconduct, such as when evidence is planted, and to ensure that the presumed guilty do not go free. C. Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U.Colo.L.Rev. 1037, 1038 (1996) [hereinafter cited as Slobogin, *Testilying*]. Put differently, police lie to avoid *Mapp*'s application in order to convict those the officers believe to be guilty. *Id.* at 1040. Studies show that police perjury is most common in drug cases, M. Cloud, *The Dirty Little Secret*, 43 Emory L.J. 1311, 1312 (1994) [hereinafter cited as Cloud, *Dirty Little Secret*], during the investigative and pretrial stages of a case, Slobogin, *Testilying* at 1042, specifically in suppression hearings. Chin & Wells, *Blue Wall of Silence* at 248. This is done to

"constitutionalize" a case or to insulate evidence from exclusion. Slobogin, *Testilying* at 1045.

In Chicago, constitutionalizing a case is called "shading." Chicago Appleseed Fund for Justice, Criminal Justice Project, *A Report on Chicago's Felony Courts*, 76 (December 2007) [hereinafter cited as Appleseed Project]. The Appleseed Project interviewed defense attorneys, prosecutors, and judges at Chicago's primary criminal courthouse and found that all public defenders (24), two-fifths of prosecutors (12 of 27), and most judges (20 of 27) believed police perjury occurs. *Id.* at n. 115. Shading one's testimony ranged from the seemingly innocuous – altering an arrestee's height or weight in a police report – to substantive matters – claiming offenders admitted possessing drugs. *Id.* Perhaps the two most disturbing aspects of testilying are that these lies are frequently outcome-determinative, and that it is almost impossible for anyone to discern which officer is being honest and which is not. Cloud, *Dirty Little Secret* at 1311, Appleseed Project at 77.

In the years following *Mapp*, courts were confronted with allegations of police perjury, commonly in the form of "dropsy" testimony. For example, in the case *Bush v. United States*, two men faced narcotics charges and the evidence against them was predicated on the testimony of one undercover officer. 375 F.2d 602, 603 (D.C. App. 1967). Following their convictions, the defendants appealed, seeking a rule that juries be instructed that narcotics officers' uncorroborated testimony must be viewed with suspicion and used with caution. *Id.* at 604. Soon-to-be Chief Justice Burger rejected appellants' arguments, finding "it would be a dismal reflection on society to say that when the

guardians of its security are called on to testify in court under oath, their testimony must be viewed with suspicion. This would be tantamount to saying that police officers are inherently untrustworthy." *Id.*

In contrast, one judge all too familiar with dropsy testimony examined the problem of testilying nearly 25 years before the Mollen Commission gave it a name. Judge Irving Younger confronted dropsy testimony head-on when an officer testified at a suppression hearing that upon seeing said officer, Defendant McMurty dropped a small plastic container, which, when recovered, proved to be marijuana. *New York v. McMurty*, 314 N.Y.S. 2d 194, 195 (Crim.Ct. N.Y. 1970). This was standard ilk as far as Judge Younger was concerned. The defendant did not deny that he had marijuana; rather, he knew "after twelve years of involvement with drugs and four or five prior convictions, that illegal-search-and-seizure was [his] only defense." *Id.* Armed with this "knowledge," McMurty testified the last thing he would do was drop his marijuana; instead he had hoped the officer would search him without cause, which is precisely what he alleged occurred. *Id.*

Judge Younger found extraordinary that police gave dropsy testimony in "hundreds, perhaps thousands" of cases every year. *Id.* at 195-196. Quoting himself, it was apparent to the Judge that police committed perjury in some cases or, perhaps, in nearly all of them. *Id.* at 196, quoting I. Younger, *The Perjury Routine*, The Nation (May 8, 1967). Judge Younger remembered that in the months after *Mapp*, officers continued to tell the truth in court, resulting in suppression, until the officers realized that drugs dropped on the ground in plain view

would survive suppression motions. *Id.* Believing that dropsy testimony should be scrutinized with caution, Judge Younger disagreed with then-Judge Burger's language in *Bush*: "When there are grounds for believing that the guardians of its security sometimes give deliberately false testimony, it is no dismal reflection on society for Judges to acknowledge what all can see. If courage is the secret of liberty, the first task of free men is to call things by their right name." *Id.* at 197 (internal citations and quotations omitted). Although he desired to place the burden of admissibility on the prosecution, Judge Younger, bound by precedent, denied McMurty's motion to suppress. *Id.* at 198.

In 1975, one court faced the dilemma of what process must occur upon a showing that a warrant affidavit contained perjurious statements. *United States v. Petillo*, 400 F.Supp. 1152 (D.C.N.J. 1975). Petitioners claimed they were denied due process when they were denied a full and fair opportunity to demonstrate that the issuing magistrate had been deceived. *Id.* at 1156. The affiant officer had procured the warrants through information from a "reliable informant." *Id.* at 1158. Arguing that material portions of the affidavit could be proven false, Petillo proceeded to show through testimony that the officer was lying. *Id.* at 1158-1160. The trial court denied the motion to suppress, not because there was insufficient indicia of perjury, but because it agreed with the prosecution that state law prohibited attacking the truth of an affidavit. *Id.* at 1164.

The District Court of New Jersey found the ruling could not survive constitutional scrutiny. *Id.* at 1165. The court concluded that due process

required, after a preliminary showing of misrepresentations in warrant applications that the defendant be allowed to attack the veracity of police affidavits, not just for the defendant, "but to protect the courts themselves from becoming unwitting and unwilling accomplices in the willful disobedience of a Constitution. *Id.* at 1177, quoting *Elkins v. United States*, 364 U.S. 206, 223 (1960) (internal quotations omitted). Three years later, *Franks v. Delaware* was decided. 438 U.S. 154 (1978) (holding if a defendant shows an affidavit contains false statements, the Fourth Amendment requires an opportunity to challenge the truthfulness of statements therein, and if perjury is shown by a preponderance of the evidence and probable cause is lacking without the perjury, the evidence must be suppressed).

In a case following *Franks*, an officer lied in a warrant affidavit, listing one "John" as an informant who indicated drugs were being dealt out of an apartment. *Commonwealth v. Lewin*, 405 Mass. 566, 566-567 (1989). An officer was killed in the execution of the warrant. *Id.* at 568. Defense counsel unearthed that John was used by the same officer to secure 31 warrants in less than one year. *Id.* at 571. Ordered several times by the judge to produce John, who, if he existed, would have potentially exculpatory information, several officers went about the task – filing reports and testifying that John was still being sought. *Id.* When John was not produced, the indictments were dismissed by the trial judge, who found the officers' and prosecution's conduct deliberate and egregious. *Id.* at 574. Under order of the court to explain themselves via affidavits, the officers admitted their perjury. *Id.* at 576. On appeal, the court determined John did not exist. *Id.*

at 582. Noting the defense had easily met its burden under *Franks*, the court described the officers' conduct as reprehensible, egregious, knowing, and a blatant violation of their sworn duties that deserved censure, condemnation, and punishment. *Id.* at 585-586.

B. MODERNITY'S DOCUMENTATION AND CONCEPTION OF TESTILYING

In a recent federal drug case, a court granted a motion to suppress due to incredible testimony by officers. *United States v. Matos*, 07-CR-870 (NGG), 1 (E.D.N.Y. Sept. 23, 2008). A fugitive task force, consisting of U.S. Marshals and New York City police, arrested the cousin of the man they sought. *Id.* at 2. According to the officers' testimony, the following events unfolded: Matos, while balancing his cell phone on his shoulder, reached into his pocket and dropped two bags containing cocaine in plain view of the officers. *Id.* at 2-3. Once inside his apartment, Matos spontaneously blurted out that drugs were present. *Id.* at 3-4. Matos' account differed significantly, including how the officers approached (guns drawn, yelling profanities) and whether he dropped anything, consented to the search of his apartment, or indicated the presence of drugs (he did not). *Id.* at 5-6.

The government argued there was probable cause to arrest Matos based on the dropsy testimony of the officers. *Id.* at 8. The court found "the officers' chronicle of events to be a complete fabrication. Each step of the officers' story defies credibility." *Id.* at 9. Later, the court granted the government's motion to re-open the suppression hearing, not because the

court believed its conclusions that the officers' testimony "was not credible and possibly perjurious" was incorrect, but because the government should be granted an opportunity to prove those conclusions wrong. *United States v. Matos*, 2008 WL 5169112 (E.D.N.Y Dec. 8, 2008).

In a "disturbing" case of government misconduct, an officer testified that he knew Darwin Jones and saw him pedal away on a bicycle, which was suspicious, as Jones had never avoided the officer before. *United States v. Jones*, 2009 U.S. Dist. LEXIS 6434, *1-2 (D. Mass. 2009) (unpublished). What made this testimony "false" were the officer's statements to the prosecutor – in three separate interviews – that he did not recognize Jones. *Id.* at *4-8. That such exculpatory evidence was not disclosed raised the ire of the court. The officer was discredited due to his contradictory statements to the prosecution, inconsistencies in his police reports, and a finding that he had testified untruthfully in another case. *Id.* at*21-23. The court similarly discredited the testimony of the two other officers, as each had testified untruthfully in another criminal prosecution. *Id.* at *25 n. 6. Ultimately, the court ruled due process had not been offended because the inconsistent statements were produced prior to the suppression hearing, *Id.* at *3. Notably, to prove what it described as an egregious failure to disclose exculpatory evidence in Jones' case, as well as "a dismal history of intentional and inadvertent violations," *id.* at *13, the court attached eight examples of misconduct to its ruling, which included prosecutors and/or officers intentionally withholding exculpatory evidence, disobeying court orders, failing to disclose documents and impeaching evidence,

making misrepresentations, and belatedly disclosing exculpatory information. *Id.* at *50-53.

Numerous courts have found testilying to be a serious problem. Although they approach the problem differently, increasingly jurists call the phenomenon by its right name: perjury. Such lies have the capacity to deprive a person of their liberty and, under statutory schemes such as DAFPA, their property. What is clear at this point is that some police officers will lie. They lie to avoid *Mapp*'s application. They lie to cover up for their misconduct. They lie to cover up their fellow officers' misconduct. They lie to ensure the conviction of those the officers have decided are guilty. Some of these motives to lie are less opprobrious than others; in at least some cases, the officers' motives are to achieve a form of "justice." For all of these reasons, it is the courts that are better equipped to decide constitutional questions. Police officers should be left to do police work. Judges should make probable cause and other determinations to uphold the Constitution.

"There comes a point where this Court should not be ignorant as judges of what we know as men." *Watts v. Indiana*, 338 U.S. 49, 52 (1949) (Frankfurter, J.). Police brutality and corruption exist, but this Court need not swallow the large pill that all officers lie to acknowledge this (*i.e.*, to call things by their right name). In 1994, law enforcement officials told the Mollen Commission that police perjury had lead to a rise in acquittals, because "juries increasingly suspect and reject police testimony." Mollen Commission at 39. One year later a New York prosecutor had this to say about the impact of police perjury exposed in the O.J. Simpson

case: "Our prosecutors now have to begin their cases defending the cops. Prosecutors have to bring the jury around to the opinion that cops aren't lying. That's how much the landscape has changed." J. Sexton, *Jurors Question Honesty of Police*, N.Y. Times, Sept. 25, 1995 (quoting Michael F. Vecchione), available at nytimes.com/1995/09/25/nyregion/jurors-question-honesty-of-police.html. Thus, the common belief in some communities is, "whether you stand still or move, drive above, below or at the speed limit, you will be described by the police as acting suspiciously should they wish to stop or arrest you." *United States v. Broomfield*, 417 F.3d 654, 655 (7th Cir. 2005) (Posner, J.). Officers' unreviewed probable cause determinations under DAFPA are suspect, because "such subjective, promiscuous appeals to an ineffable intuition should not be credited." *Id.*

C. CHICAGO: A CASE STUDY

Chicago, a city known for governmental corruption, is rife with examples of police misconduct. The press is overrun with stories such as a Chicago police officer convicted of beating a female bartender, or seven officers in an elite unit being federally charged with robbery and kidnapping. R. Hussain, *Suspended Chicago Cop Anthony Abbate Convicted of Beating Female Bartender*, Chi. Sun Times, June 2, 2009, available at suntimes.com/news/24-7/1603349,cop-anthony-abbate-verdict060209.article; National Public Radio, *Scandals Bring Down Chicago's Elite Policing Unit*, October 10, 2007, available at npr.org/templates/story/story.php?storyId=15149792.

The public learns an officer has been sentenced to 40 months in prison for beating a man that was handcuffed to his wheelchair. N. Korecki and T. Fardon, *Former Chicago Cop William Cozzi Sentenced to 40 Months*, Chi. Sun Times, June 12, 2009, available at suntimes.com/news/metro/1618841,william-cozz-sentence-video-beating-061109.article. Chicagoans see articles showing what citizens can expect if they help an injured police officer – 10 months in jail. M. Garcia and D. Heinzmann, *Chicago and Police Officers Lose Case and $7.7 million for False Arrest*, Chi. Trib., June 12, 2008, available at archives.chicagotribune.com/2008/jun/12/local/chi-federal_jury_verdictjun13. They learn, not only that a veteran Chicago officer has been convicted of raping a woman while on duty, but that the judge who heard the case described two officers' testimony as "nothing short of perjury." K. Ataiyero, *Officer Found Guilty of Rape: Judge Criticizes Court Testimony of 2 Detectives*, Chi. Trib., Dec. 11, 2007, available at archives.chicagotribune.com/2007/dec/11/news/chi-herman11dec11. Residents of Chicago learn the City must pay four million dollars to a man who two officers sodomized with a screwdriver. J. Coen, *2 Officers Held Liable in Assault: Man Stands to Get $4 Million from City*, Chi. Trib. Oct. 17, 2007, available at archives.chicagotribune.com/2007/oct/17/news/chi-screwdriver_alloct17. And Chicagoans are all too familiar with allegations that police tortured suspects to induce confessions, which has resulted in the indictment of the alleged ringleader of the torture for perjury in a civil suit. S. Mills and J. Coen, *Feds Catch Up with Burge: Notorious Ex-Chicago*

Commander Charged with Lying About Torture, Chi. Trib., Oct. 22, 2008, available at chicagotribune.com/news/local/chi-burge-22-oct22,0,6553487.story. While sentencing a Chicago police officer to almost 11 years in prison for robbery, Judge Gettleman of the Northern District Court of Illinois, summed up the feelings of many when he said, "In this city, it seems to me we are bombarded by stories and cases and prosecutions of police misconduct....It's been accelerating...It's very discouraging." N. Korecki, *Judge: I'm Tired of Crooked Cops in Chicago*, Chi. Sun Times, June 30, 2009, available at suntimes.com/news/metro/1645499,badcop-chicago-063009.article.

Recently, widespread, traffic stop-related misconduct by Chicago police officers has been alleged. Officer misconduct, including perjury and false reporting, has lead to several dozen criminal cases being dismissed and has exposed the City to considerable civil liability. Chicago police officer John Haleas, honored for writing the most DUI citations in the State of Illinois, had two prosecutors ride along with him on patrol one night in 2005. During Haleas' DUI arrest that night, these prosecutors documented blatant violations of departmental policies, causing them to complain to internal affairs, which in turn sustained several allegations of misconduct. Fifty DUI prosecutions involving Haleas were dropped and the state's attorneys office acknowledged perhaps as many as 500 cases were in jeopardy of dismissal. B. Bradley, *50 DUI Cases Dropped Over Cop's Improper Procedure*, ABC News 7 Chicago, Oct. 24, 2007, available at

abclocal.go.com/wls/story?section=news/local&id=572389. The fallout from Haleas' actions included the filing of at least eight federal civil rights lawsuits, some involving multiple plaintiffs.

Another Chicago officer, Richard Fiorito, also honored for substantial DUI arrests, was alleged to have targeted gay men and women for stops and then falsely arresting them for DUI and traffic violations. Prosecutors dismissed two of Fiorito's cases and a judge dismissed a third. N. Ahmedullah, *Lawsuits Accuse Chicago Police Officer Richard Fiorito of False DUI Arrests, Harassing Gays*, Chi. Trib., April 3, 2009, available at archives.chicagotribune.com/2009/apr/03/local/chi-cop-gay-protestapr03. Fiorito and the City of Chicago have been sued more than ten times for the conduct alleged above.

It only takes one so-called bad apple. In the context of DAFPA, one officer with nefarious intent can deprive countless vehicle owners of their property and he can do this for more than six months without judicial oversight. In the interim, the owners are often without reliable means to transport themselves and their families. Sadly, the reality in Chicago is that there is far more than one bad apple. Chicago's Police Superintendent went so far as to be held in contempt of court (for refusing to produce a list of officers with repeated complaints) to prevent the public from learning how many bad apples existed under his command. K. Hawkins, *Top Cop Jody Weis Found in Contempt of Court Over Reported Cops List*, The Huffington Post, March 4, 2009, available at http://www.huffingtonpost.com/2009/03/04/top-cop-jody-weis-found-i_n_171937.html. The list would

have included officers with up to 65 citizen complaints in the last five years and about 2,500 officers with six or more complaints. *Id.* In a city with a police force exceeding 13,000 members, how many bad apples constitute a "few"? Illinois citizens need their rights protected, be it from hundreds of officers or one.

III. INCENTIVIZING MISCONDUCT: THE PECULIAR AND PARTICULAR PROBLEMS OF CIVIL FORFEITURE

Thus far, Amicus has presented evidence that police perjury and misconduct exist. DAFPA is particularly dangerous in that it is predicated on trusting an officer to properly assess probable cause when seizing citizens' property – a determination that can divest an owner of their vehicle for more than 187 days without judicial review. The Seventh Circuit believed such a statutory scheme implicated due process and took steps to mitigate the risk of erroneous deprivations. The lower court believed due process required a probable cause determination even without emphasizing the most suspect aspect of DAFPA: that depending on the value of the vehicle seized, owners wait 97-187 days just for the forfeiture action to be filed and that, should the property be forfeited, the seizing agency reaps 50-65% of the profits.

The federal government and nearly every state have a drug asset forfeiture statute, the majority of which use money from seized property to fund law enforcement. See E. Blummenson & E. Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U.Chi.L.Rev. 35 (1998) [hereinafter cited

as Blummenson & Nilsen, *Policing for Profit*]. Illinois police agencies have a direct and real financial incentive to pursue forfeitures, as 50-65% of all profits from forfeitures are returned to that agency. DAFPA codified a conflict of interest between officers' sworn duty to uphold the law, while simultaneously offering "a possible temptation to the average man as a [police officer]...not to hold the balance nice, clear and true." Blummenson & Nilsen, *Policing for Profit* at 57 quoting *Tumey v. Ohio*, 273 U.S. 510, 532 (1927). Such a conflict of interest has been held to violate due process. *Tumey*, 273 U.S. at 532 (mayor who also acted as judge in proceedings in which he had a pecuniary interest violated due process). Under DAFPA, for months, a police officer acts as both prosecutor and judge, determining if a vehicle is associated with narcotics activities, whether to seize the vehicle, and if it will be held for later proceedings. All the while the officer knows that if the property is forfeited, half to two-thirds of any monies made will return to her department. For departments facing budget problems, officers and their superiors may see forfeiture as the means to supplement their shortfall, encouraging police to chase profitable law enforcement goals rather than legitimate ones. Blummenson & Nilsen, *Policing for Profit* at 56. As argued in Section II, *infra*, some police will lie, under oath, to escape suppression under *Mapp* or to conceal their misconduct. Add to that a pecuniary interest in making particular arrests and seizures, and the law begets lawlessness. This is not merely a possibility; the effects of officers' pecuniary interest in law enforcement can already be seen in the following examples.

Several Oakland Housing Authority (OHA) officers were convicted in federal court for civil rights violations and appealed their convictions. *United States v. Reese*, 2 F.3d 870, 873 (9th Cir. 1993). Aware that the federal grant that funded their special task force was limited to 18-24 months, these officers, who took "anything and everything" they saw like a "wolf pack," were often reminded to keep their arrest numbers up in order to secure another grant. *Id.* at 874. The commanding officer told his officers it was permissible to steal money from drug dealers because they had no one to which to complain. The supervisor began shifts with motivational quips like: "Let's go out and kick ass...Everybody goes to jail tonight for everything, all right?" *Id.* The officers followed these directives, and the Ninth Circuit documented egregious instances of excessive force (*e.g.*, striking suspects in the head with flashlights, performing rectal searches on the street), false arrests, failing to prevent injuries to arrestees, stealing, false reporting (including dropsy arrests), and perjury that went on for months. *Id.* at 874-880. The court upheld the appellants' convictions. *Id.* at 897. These officers were motivated – at least in part – by financial incentives: ensuring the money that funded their task force was renewed.

In 1992, a task force comprised of officers from numerous state and federal agencies was created following information from a confidential informant that Donald Scott, a wealthy 61-year-old, was growing substantial amounts of marijuana on his property. Blummenson & Nilsen, *Policing for Profit* at 73. Although the informant's claims were not corroborated, thirty task force members raided

Scott's home; responding to his wife's screams, Scott armed himself and was shot dead in front of his wife. *Id.* at 74. No drugs were found on Scott's property and a district attorney's investigation uncovered disturbing facts: there was no evidence that marijuana was being grown on Scott's property, much of the information contained in the supporting affidavit was false, and exculpatory information was withheld from the issuing magistrate. *Id.* More to the point, the district attorney's investigation showed that the goal of the raid was to obtain the proceeds from Scott's five-million-dollar home once it was forfeited. *Id.* at 74-75. Before the raid, officers were given appraisals of Scott's land. *Id.*

Regardless if the motivation is federal funding (*Reese*) or forfeiture of high-value property (Donald Scott), it is clear that officers' pecuniary bias can cause selective and abusive policing and a practice of targeting assets instead of criminals. *Id.* at 77. The Court recognizes that certain conflicts of interest, akin to that codified in DAFPA, violate due process. *Tumey*, 273 U.S. 510. The Constitution cannot tolerate a statute where an officer's determination of probable cause constitutes all the process that is due owners of seized property, especially when this determination can hold without judicial review for more than six months. As a result, the question remains how to test these due process considerations. Amicus argues *Mathews* provides the flexibility and protection required under the circumstances.

IV. DUE PROCESS AND DAFPA

Under DAFPA, officers are the only process due to persons whose cars are seized - police officers

alone determine the rights of aggrieved individuals under the Act, and as this Court recognizes, "the floor established by the Due Process Clause clearly requires a 'fair trial in a fair tribunal.'" *Bracy v. Gramley*, 520 U.S. 899, 904-905 (1997), quoting *Withrow v. Larkin*, 421 U.S. 35, 46 (1975). This procedural floor guarantees "a judge with no actual bias against the defendant or interest in the outcome of his particular case." *Bracy*, 520 U.S. at 905, citing *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 821-822 (1986); *Tumey*, 273 U.S. at 523.

As written, DAFPA does not comport with the minimum requirements of due process. Finding the statutory scheme to be constitutionally repugnant, the Seventh Circuit introduced a prophylactic, adversarial hearing to the same purpose this Court has continuously served: to protect the citizenry from governmental overreaching.

Lower courts have voiced concerns about forfeiture in other instances. *United States v. That Certain Real Property Located at 632636 Ninth Avenue, Calera, Alabama*, 798 F.Supp. 1540, 1551 (N.D. Ala. 1992) (discussing frustration with governmental overreaching in forfeiture cases, whose funding mechanism creates a "built-in conflict of interest" for law enforcement agencies). Members of this Court have voiced similar concerns. *Bennis v. Michigan*, 516 U.S. 442, 456 (1996) (Thomas, J., concurring: if used improperly "forfeiture could become more like a roulette wheel employed to raise revenue from innocent but hapless owners whose property is unforeseeably misused, or a tool wielded to punish those who associate with criminals, than a component of a system of justice.").

Permeating this Court's jurisprudence is a healthy realism about the constitutional bounds in which police may act. For example, where a confidential informant provides the basis for probable cause in a warrant affidavit, the affiant officer must provide the issuing magistrate with sufficient indicia of veracity and credibility, given the totality of the circumstances, to justify the warrant. *Illinois v. Gates*, 462 U.S. 213 (1983).

This constitutionally required skepticism exists before the arrest, as in *Gates*, and continues after the arrest. For example, where a criminal defendant preliminarily shows a warrant was obtained through false statements, the Constitution mandates that defendant be given an opportunity to challenge the statements made in the affidavit, and, if he does so by a preponderance of the evidence and probable cause is lacking as a result, the evidence obtained thereon must be suppressed. *Franks*, 438 U.S. 154. Likewise, if a person is arrested without a warrant and is charged via an information, the Fourth Amendment demands a timely determination of probable cause to continue pretrial restraint by a neutral magistrate. *Gerstein*, 420 U.S. 103 (1975).

Where property is concerned, this Court has also been skeptical of non-judicially ordered deprivations. Upholding a "constitutional accommodation," this Court allowed deprivation of property by a creditor under a writ of sequestration, even with no notice to the debtor. *Mitchell v. T. Grant Co.*, 416 U.S. 600, 609-610 (1974). However, this was held permissible only where procedural safeguards existed – writ allowed only after a judge reviewed a verified affidavit, sufficient bond posted, damages provision for wrongful sequestration, and

provision for immediate hearing following the seizure (*i.e.*, a post-seizure probable cause hearing). *Id.* at 616-618. If seizure can "drive a wage-earning family to the wall" or be abused by creditors, notice and a prior hearing are required. *Sniaddach v. Family Finance Corp.*, 395 U.S. 337, 341-342 (1969) (regarding wage garnishment). So too for the federal government to seize real property in a civil forfeiture action, the Fifth Amendment requires prior notice to the owner as well as a hearing, absent exigent circumstances. *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993).

Inherent in these cases is the recognition that Fourth Amendment and due process protections run "almost into each other." See *Mapp*, 367 U.S. at 646, quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886). These opinions recall the cherished maxim that physical invasion by the government is a particularly serious intrusion affecting one's right to exclude, "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Loretto v. Telepromter Manhattan CATV Corp.* 458 U.S. 419, 433 (1982), quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979). Although there is no doubt the protections of the Fourth Amendment apply in civil and criminal contexts, *Good*, 510 U.S. at 68-69 (Rehnquist, Ch. J., concurring in part and dissenting in part), citing *Soldal v. Cook County*, 506 U.S. 56, 67 (1992), resolution of this matter likely depends on this unanswered question: whether there is a constitutional distinction between real and personal property under the Fourteenth Amendment in forfeiture actions. *Good*, 510 U.S. at 76 (O'Connor,

J., concurring in part and dissenting in part) (finding no distinction).

A. *MATHEWS* IS THE PROPER TEST FOR DAFPA

This Court and the Seventh Circuit understand that because personal property is easily moved, concealed, or destroyed, the government's concerns make pre-seizure notice and hearings not always feasible. *Smith*, 524 F.3d at 836, citing *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974). Acknowledging that a post-seizure hearing was still required by due process, the court below appropriately focused on timing as the issue. *Id.* Amicus argues Justice O'Connor was right to discern no constitutional distinction between real and personal property as to whether process is due; the distinction lies in what that process should be, in that real property owners are entitled to pre-seizure notice and hearing, *Good*, 510 U.S. 43. Furthermore, pre-seizure hearing and notice is the rule; lack thereof is the exception, tolerated only in extraordinary situations. *Id.* at 53, quoting *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971). Given that the Court in *Mathews* dealt with the government's desire to continue holding citizens' property pending a final judgment (see *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)), both the Second and Seventh Circuits relied on *Mathews* to accord due process to persons facing forfeiture. *Smith*, 524 F.3d 834; *Krimstock v. Kelly*, 306 F.3d 40 (2d Cir. 2002).

A balancing test, *Mathews* requires courts to consider these factors: the private interest affected by governmental action, the risk of erroneous deprivations of property, the probable value of additional protections, and the burden on the government of additional procedural requirements.

Mathews, 424 U.S. at 335. The court below relied heavily on the Second Circuit's analysis in *Krimstock*, a situation in which seized vehicles could be held for "months or even years" before forfeiture proceedings were complete. *Krimstock*, 306 F.3d at 44. Also, the New York City code at issue in *Krimstock* afforded owners no opportunity for a prompt post-seizure hearing to test for probable cause. *Id.* at 45. Likewise, the *Krimstock* court had to determine what process is due a person whose vehicle is seized by an officer without a warrant. *Id.* at 48.

As Amicus has argued, "some risk of erroneous seizure exists in all cases," and the *Krimstock* court's concerns were "heightened by the fact that the seizing authority in this case has a direct pecuniary interest in the outcome of the procedure." *Id.* at 50-51, citing *Property Clerk v. Hyne*, 147 Misc. 2d 774, 780 (Sup. Ct. N.Y. Co. 1990) (internal quotations omitted). Also of great concern in *Krimstock* was the large time gap between the seizure and the ultimate ruling on forfeiture, a constitutional black-hole where the city, for a significant period, was not held responsible for the legality of the seizure. *Id.* at 54. The Second Circuit also focused on the plight of innocent owners, persons who owned the vehicles but were not driving at the time of the seizures. *Id.* at 56. Thus, the scope of police power to seize, coupled with officers' pecuniary interest in forfeiture, convinced the court to provide a prompt opportunity for a neutral magistrate's review of the validity of continued detention. *Id.* at 57.

Turning to the *Mathews* test, the court found motor vehicles to be of particular importance for transportation and to earn a livelihood. *Id.* at 61. So too did the Seventh Circuit state that today's society

is highly dependent on the automobile, the seizure of which can result in missed doctor's appointments, missed school, or loss of one's job. *Smith*, 524 F.3d at 838. Given that this Court has confronted cases where a vehicle is a person's home, *Soldal*, 506 U.S. 56, it is not hyperbolic to suggest that loss of one's vehicle could drive a family to the wall. See *Sniaddach*, 395 U.S. 337. Hence, the first *Mathews* factor, the private interest involved, weighs heavily in favor of Respondents.

The *Krimstock* and *Smith* courts thoroughly considered the plight of the innocent owner and balanced those interests against the government's. The Second Circuit found "neither the arresting officer's unreviewed probable cause determination nor a court's ruling in the distant future" adequately protected citizens from erroneous deprivations. *Krimstock*, 306 F.3d at 62. The court expressed additional concern where an erroneous deprivation is not cured by ultimately prevailing in court; an owner cannot recover lost use of a vehicle or the depreciation it suffers while sitting idle in impoundment, thus favoring Respondents on the second *Mathews* factor. *Id.* at 64.

The *Smith* and *Krimstock* courts recognized the cities' interests in ensuring that vehicles subject to forfeiture proceedings were not sold or destroyed prior to final ruling. *Smith*, 524 F.3d at 838; *Krimstock*, 306 F.3d at 63. However, the Seventh Circuit, sympathetic to the reality that a probable cause hearing would create some burden on the City, appropriately pointed out that this administrative burden is a necessary price of ensuring due process of law. *Smith*, 524 F.3d at 838. Whereas, the court in *Krimstock* took the view that since the owners (as

here) only sought to challenge continued retention, the city had other means of restraint beyond actual possession, such as bonds or a restraining order prohibiting sale or destruction. *Krimstock*, 306 F.3d at 64-65.

On balance, the Seventh Circuit, like the Second Circuit before it, found that *Mathews* required a prompt post-seizure hearing to determine the validity of continued detention of owners' vehicles. Neither court was persuaded by the government's arguments that *Mathews* was the incorrect test. The *Krimstock* opinion (referring to the *Smith* court's discussion) distinguished the cases relied upon by Petitioners. The cited cases, *United States v. $8,850*, 461 U.S. 555 (1983) and *United States v. Von Neumann*, 474 U.S. 242 (1986), are factually and legally dissimilar from the case before the Court. The former deals only with the speed in which the forfeiture proceeding begins, not whether there should be a hearing to test the detention in the first place, while *Von Neumann* is distinguishable because it does not involve civil forfeiture, but rather, customs laws. *Smith*, 524 F.3d at 837. Furthermore, the delay in *Von Neumann* was approximately one month, the vehicle was released in a matter of weeks after posting bond, and, most significantly, there was a procedure to obtain the speedy release of the vehicle prior to the forfeiture hearing. *Id.* In short, Von Neumann had the exact protection the Respondents seek.

B. *GERSTEIN* IS THE PROPER ANALOGY

Finally, the Seventh Circuit did not supplant the forfeiture proceeding itself; rather, it envisioned a

flexible, "perhaps rather informal," hearing with notice to the owner to allow a showing that the property should be released. *Id.* at 838. There has been no suggestion the hearing should be a lengthy, exhaustive duplication of the forfeiture proceeding, but it should "protect the rights of both an innocent owner and anyone else who has been deprived of property and...to see whether a bond or an order can be fashioned to allow the legitimate use of the property while the forfeiture proceeding is pending." *Id.* at 838-839. To analogize, what the Seventh Circuit required is akin to a *Gerstein* hearing. Although rooted in criminal law, the reasoning in *Gerstein* is equally persuasive here.

The issue in *Gerstein* was whether a person arrested and held for trial by a prosecutor's information was guaranteed a judicial determination of probable cause to justify continued pretrial detention. *Gerstein*, 420 U.S. at 63. This Court noted its longstanding requirement that existence of probable cause must be decided by a neutral and detached magistrate "whenever possible," because "the point of the Fourth Amendment, which is often not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences... Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Id.* at 64, quoting *Johnson v. United States*, 333 U.S. 10, 13-14 (1948).

The reasoning in the *Gerstein* Court was primarily a balancing – what it described as a practical compromise. While the policeman's assessment of probable cause justified the arrest and

brief period thereafter for administrative processing, after custody the reasons not to include a magistrate "evaporate," as there is no danger the suspect can escape or commit more crimes. *Id.* at 65. And while the government's reasons for taking action subsided, the individual's need for a neutral determination increased, because the consequences of prolonged detention of the person, like Respondents' vehicles here, "may imperil the suspect's job, interrupt his source of income, and impair family relationships." *Id.* A neutral magistrate's detached judgment was essential when the stakes were so high. *Id.* The Court rejected the argument that a prosecutor's decision to file an information sufficiently determined probable cause, since the prosecutor's law enforcement role was constitutionally distinct from the role filled by neutral judges. *Id.* at 67. As here, the *Gerstein* Court did not envision a "fine resolution" of conflicting evidence, but required only that criminal suspects be given a fair and reliable determination of probable cause to justify pretrial restraint, which must be done by a judge before or promptly after arrest. *Id.* at 69 and 71-72.

The *Gerstein* Court guaranteed that which Respondents seek:

> "A democratic society, in which respect for the dignity of all men is central, naturally guards against the misuse of the law enforcement process. Zeal in tracking down crime is not in itself an assurance of soberness of judgment. Disinterestedness in law enforcement does not alone prevent disregard of cherished liberties. Experience has

> therefore counseled that safeguards must be provided against the dangers of the overzealous as well as the despotic."

Id. at 68, quoting *McNabb v. United States*, 318 U.S. 332, 343 (1943). The Seventh Circuit did not mandate two full evidentiary hearings – it granted only an audience with a detached and neutral magistrate to determine the continued validity of the warrantless seizures of private property. As in *Gerstein*, the stakes are high, but unlike in *Gerstein*, disinterestedness in law enforcement is lacking under DAFPA. Given the phenomena of police officers' testifying and the fact that police officers are not capable judges of probable cause, due process demands an opportunity for citizens to protect themselves from unwarranted invasions of their property, especially when the seizing officers have a direct pecuniary stake in the seizure. The judgment of the Seventh Circuit should be affirmed.

CONCLUSION

The court of appeals' decision should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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(9)

No. 08-351

In the Supreme Court of the United States

ANITA ALVAREZ, COOK COUNTY STATE'S ATTORNEY,
Petitioner

v.

CHERMANE SMITH, ET AL.,
Respondents

On a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF *AMICUS CURIAE* WOMEN'S CRIMINAL DEFENSE BAR ASSOCIATION IN SUPPORT OF RESPONDENTS

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Eric Blumenson & Eva Nilsen, *Policing for Profit: the Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35 (1998) 37

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INTEREST OF THE AMICUS

The Women's Criminal Defense Bar Association (WCDBA) promotes the position of women criminal defense attorneys engaged in the practice of law. The WCDBA provides a forum through which members, who are licensed to practice in Illinois, can share experiences in representing clients caught in the web of the criminal justice system. Members also represent individuals who seek return of property that has been seized for civil forfeiture. The WCDBA is acutely aware of the devastating impact of many such seizures on their clients, and is concerned with the failure of the Illinois Drug Asset Forfeiture Procedure Act (DAFPA) to provide a prompt opportunity for individuals whose property has been seized to contest the probable cause for such seizure.[1]

SUMMARY OF ARGUMENT

The seizure of personal property in this case implicates considerations under the Fourth Amendment and the Due Process Clause. Because there was no independent judicial review of the law enforcement officials' evidence either before or immediately after the seizure, a prompt post-seizure hearing is required under the Fourth Amendment and Due Process Clause to ensure that there was probable cause for the seizure. And, because Illinois

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[1]The WCDBA files this brief with the consent of all parties. The letters granting consent have been filed with the Court. No counsel for a party authored this brief in full or in part, and no entity other than the WCDBA or its counsel provided financial support for preparation and submission of this brief.

has created a property interest in "innocent owners" under DAFPA, 725 ILCS 150/1 et seq., such owners must also be provided a prompt opportunity after the seizure to vindicate their state-created interest in continued use of their personal property. As the court of appeals held, both property-based interests, that of all claimants as well as "innocent owners," can be vindicated efficiently if law enforcement authorities afford notice and an opportunity to be heard promptly after the seizure.

The Fourth Amendment provides in part that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Prior to any search or seizure, government officials generally must have probable cause. Moreover, where possible, they must present the information to a neutral magistrate for review, linking that probable cause to the individuals specified, premises to be searched, and items to be seized. The warrant process "interposes an orderly procedure" *United States v. Jeffers*, 342 U.S. 48 (1951), limiting the potential for government overreaching. A seizure of personal property is "per se unreasonable within the meaning of the Fourth Amendment unless it is accompanied pursuant to a judicial warrant issued upon probable cause." *United States v. Place*, 462 U.S. 696, 701 (1983). When warrants cannot be obtained prior to the seizure, the government must hold a hearing to test the probable cause for the seizure immediately after the seizure is consummated. *Krimstock v. Kelly*, 306 F.3d 40, 70 (2d Cir. 2002); *cf. Gerstein v. Pugh*, 420 U.S. 103 (1975).

DAFPA starkly departs from these foundational Fourth Amendment protections. The

Act authorizes seizure of property without a warrant and, more egregiously, dispenses with external review of that probable cause determination. Moreover, the Act does not require law enforcement officials to communicate either the fact of seizure or basis for the seizure promptly to the owners. Rather, the legitimacy of the seizure is only tested, if ever, at a forfeiture hearing months or, in some cases, years later.

The probable cause determination in forfeiture cases is not automatic. Officials must assess the degree to which an automobile, bicycle, or cash is connected to illegal activity. That assessment may turn on forensic as well as on eyewitness testimony. And, the officials are not disinterested parties. Their departments, as in this case, stand to gain financially from any forfeiture. Indeed, this Court in *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993), held that the Constitution required a probable cause hearing *prior to* seizure of real property. That reasoning dictates the result here – when pre-deprivation notice and hearing are impractical, the state must convene a hearing promptly after the seizure. Not only is a year-long delay until the forfeiture proceeding excessive, but the question in that proceeding turns not on whether the law enforcement officials had probable cause at the time of seizure but rather -- based in part on evidence subsequently gathered -- whether the property ultimately is subject to forfeiture.

As with the Fourth Amendment, the Due Process Clause demands notice and an opportunity for the property owners to be heard as to whether the seizure was justified. *James Daniel Good Real Property*, 510 U.S. 43. The Due Process Clause determines the procedures to use in ascertaining

whether the government's seizure is justified. The government has demonstrated no weighty interests justifying either the delay or failure to subject its agents' spur of the moment probable cause assessment to judicial oversight. As this Court stated in *C.I.R v. Shapiro*, 424 U.S. 614, 629 (1976), "the Due Process Clause requires that the party whose property is taken be given an opportunity for some kind of predeprivation or prompt post-deprivation hearing at which some showing of the probable validity of the deprivation be made."

Moreover, the familiar factors under *Mathews v. Eldridge,* 424 U.S. 319 (1976), counsel strongly for a prompt post-seizure hearing. The individual interest in control over personal property such as automobiles is considerable, and the risk of error great, given that law enforcement authorities have not previously demonstrated probable cause to the satisfaction of a neutral magistrate. Thus, this Court should uphold the Seventh Circuit's determination that a prompt post-seizure hearing is constitutionally required.

In addition, Illinois grants a property interest to "innocent owners," entitling them to continued property ownership even when law enforcement authorities can demonstrate probable cause for the seizure. As this Court explained in *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972), a state creates a property right when it constrains its discretion so as to give rise to "a legitimate claim of entitlement." *Id.* at 577. Here, Illinois has provided that owners can *maintain* property ownership in goods otherwise subject to forfeiture, even if there is no constitutional right to do so, if they demonstrate that they are "not legally accountable for the conduct giving rise to the forfeiture, did not acquiesce in it,

and did not know and could not reasonably have known of the conduct or that the conduct was likely to occur." 725 ILCS 150/9.

The balancing test in *Mathews v. Eldridge*, 424 U.S. 319 (1976), frames the inquiry as to when such "innocent owners" can assert their state-created entitlement to continued possession of their personal property after the seizure. As the court below noted, the continued use of property such as automobiles can be critical in our society. Moreover, the risk of error under the Illinois scheme is great given that no government official must consider whether there is an innocent owner until the forfeiture hearing. As this Court held in *Loudermill v. Cleveland Board of Education*, 470 U.S. 532 (1985), individuals must be afforded notice and an opportunity to be heard before any lengthy governmental deprivation of property. That opportunity need not be formal but must permit the owner to tell his or her side of the story in a meaningful way. Given that the state promptly must convene a hearing after the seizure to assess probable cause, there is little administrative burden in combining the probable cause hearing required under the Fourth Amendment with that under the Due Process Clause. As a consequence, this Court should affirm the decision of the court below.[2]

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[2]Amicus takes no position on the dispute between the parties as to whether the underlying case should be viewed as a facial or as applied challenge to DAFPA.

ARGUMENT

I.

PETITIONER'S FAILURE TO PROVIDE PROMPT NOTICE OF THE SEIZURE AND AN OPPORTUNITY FOR RESPONDENTS TO CHALLENGE WHETHER PROBABLE CAUSE EXISTED FOR THE SEIZURE VIOLATES THE FOURTH AMENDMENT AND THE DUE PROCESS CLAUSE

The court below held that the Constitution requires governmental authorities to notify property owners that their property has been seized by the state and then to afford such owners a prompt opportunity to contest the basis for the seizure. Whether the right to notice and an opportunity to be heard is housed under the Fourth Amendment or Due Process Clause,[3] the result should not be controversial: the reasonableness of any seizure turns in part on whether a neutral magistrate oversees law enforcement authorities' spilt second determinations whether to seize people and property.

A. The Fourth Amendment

In *Gerstein v. Pugh*, 420 U.S. 103 (1975), this Court considered whether the Fourth Amendment required law enforcement authorities to conduct a prompt post-arrest probable cause hearing when no warrant had been issued for the arrest. The

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[3]The Amicus Brief for the States of Illinois, et al., apparently agrees that the Fourth Amendment should govern this case, *see* Br. at 19 & n.5, and petitioner cites the Fourth Amendment as well. *See, e.g.*, Br. at 49-50.

Court reiterated that "the existence of probable cause [should] be decided by a neutral and detached magistrate wherever possible." *Id.* at 112. Such review ensures that law enforcement officials intrude into the autonomy of citizens only after articulating the bases for the intrusion and after a neutral magistrate agrees that such evidence constitutes probable cause.

This Court in *Gerstein* continued, however, that a pre-seizure warrant was not always practical, for "a policeman's on-the-scene assessment of probable cause provides legal justification for arresting a person suspected of crime." *Id.* at 113-14. Given that there is no possible ex ante review of the justifications in such situations, "the suspect's need for a neutral determination of probable cause increases significantly." *Id.* at 114. And, "[w]hen the stakes are this high, the detached judgment of a neutral magistrate is essential if the Fourth Amendment is to furnish meaningful protection from unfounded interference with liberty." *Id.* This Court therefore concluded that "the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest." *Id.*

The question in this case therefore turns on whether the *Gerstein* reasoning applies to seizures of property as well as individuals. Given that the risk of arbitrary governmental action arguably is greater in the forfeiture context because of law enforcement authorities' financial self-interest,[4] and given that

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[4]Local law enforcement authorities under Illinois law may retain sixty-five percent of the proceeds from such forfeitures. 720 ILCS 570/505(g). Overall, Illinois generates millions in forfeitures each year. In 2002, for instance, Cook County law enforcement authorities seized approximately

the individual interest in property ownership is strong, probable cause hearings should be required immediately after seizures of property, as they are for individuals.

The Fourth Amendment applies to seizures of individuals and property equally. No distinction can be drawn from the Amendment's terms: it applies to "persons, houses, papers, and effects." Indeed, this Court has held that warrants generally are required before a seizure whether law enforcement authorities attempt to seize individuals, real property, or chattel. *See, e.g., Gerstein, supra* (seizure of individual); *James Daniel Good Real Property*, 510 U.S. 43 (1993) (seizure of real property); *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965) (seizure of personal property). The need for a detached magistrate is the same, for "zeal in tracking down crime is not in itself an assurance of soberness or judgment. . . The awful instruments of the criminal law cannot be entrusted to a single functionary." *Gerstein*, 420 U.S. at 117 (citing *McNabb v. United States*, 318 U.S. 332, 343 (1948)); *see also Jeffers, supra*. When issuance of a warrant is impractical, the need for prompt oversight from a neutral magistrate to assess whether probable cause exists becomes more critical. The legal conclusion of probable cause cannot be left to the cop on the beat making a split second decision, and prompt review ex post provides a deterrent to arbitrary seizures. In fact, this Court in *Gerstein* required a prompt post-seizure hearing even when the arrest was initiated not by a police officer making an "on-the-scene"

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fifteen million dollars in cash and personal property alone. *See* Carlos Sadovi & Frank Main, *Flaunting Wealth on the Street is a Must*, CHI. SUN TIMES, April 8, 2002.

assessment, but rather by a prosecutor via an information. *Gerstein*, 420 U.S. at 117. In light of the fact that there was no such involvement of a prosecutor in this case, the need for ex post oversight is greater.

Petitioner (and the Illinois Supreme Court in *People v. 1945 N. 31st Street*, 841 N.E.2d 928, 938 (Ill. 2005)) asserts (Br. at 31-32) that seizure of property proceeds in Illinois under the theory that the property itself has committed a criminal act and is the "offender." If so, then it would follow that the seized property would be able to vindicate its right as a criminal suspect to a *Gerstein* hearing through its owner as representative.

Even if the fiction of property as offender does not hold, this Court has been clear that the Fourth Amendment applies in the civil as well as criminal context. Consider the Court's decision in *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978). There, officials from the Department of Labor's Office of Safety and Health Administration sought to inspect a business for compliance with OSHA. The owner refused to consent to the search on the ground that the inspectors had failed to obtain a warrant. The government argued that the Fourth Amendment did not apply in the civil context and that, if it did, there were sufficient safeguards in the Act so as to justify the searches. *Id.* at 316. In rejecting the government's arguments, this Court reiterated that "the Fourth Amendment prohibition against unreasonable searches protects against warrantless intrusions during civil as well as criminal investigation. The reason is found in the basic purpose of this Amendment . . . [which] is to safeguard the privacy and security of individuals against arbitrary invasions by government officials."

Id. at 312 (quoting *Camara v. Municipal Court of San Francisco*, 387 U.S. 523, 528 (1967)). This Court, moreover, stressed that "[t]he authority to make warrantless searches devolves almost unbridled discretion upon executive and administrative officers, particularly those in the field, as to when to search and whom to search. A warrant, by contrast, would provide assurances from a neutral officer that the inspection is reasonable under the Constitution . . ." *Id.* at 323.

Given the likelihood that seizures of personal property in the civil forfeiture context will not be accompanied by a warrant, the need for a prompt post-seizure hearing to check the "unbridled discretion [of] executive and administrative officers, particularly those in the field" is clear. Moreover, a prompt post-seizure hearing would "provide assurances from a neutral officer that the [interference with property] is reasonable under the Constitution." *See also Soldal v. Cook County*, 506 U.S. 56 (1992) (holding that Fourth Amendment applies to all government seizure of property); *United States v. Place, supra*. The *Marshall v. Barlow's* precedent illustrates the pivotal role of judicial oversight over the probable cause determination in the civil context.

This Court's decision in *James Daniel Good Real Property, supra,* reinforces the need for a prompt post-seizure remedy in this case. There, in an *ex parte* proceeding, a magistrate determined that the law enforcement officials had shown probable cause that Good's property was subject to forfeiture given its role in facilitating drug trafficking four years previously. The government thereafter seized the property without affording any notice to the owner. Good filed a claim for his property and

asserted that the seizure violated his rights both because it was untimely, and because he had not received prior notice or an opportunity to contest the magistrate's finding of probable cause. This Court reiterated that "[t]he right to prior notice and a hearing is central to the Constitution's command of due process." 510 U.S. at 53. It held that both were required when real property was seized in the civil forfeiture context.

To be sure, respondents in this case complain of a government seizure of personal property as opposed to the real property seized in *James Daniel Good Real Property*. As petitioner argues, this Court in *James Daniel Good Real Property* suggested that a hearing before seizure might not be warranted when personal property was at stake because personal property "might have disappeared had the Government given advance warning of the forfeiture action." 510 U.S. at 56. The question in this case, however, is not whether the law enforcement officials should have afforded respondents advance notice of the seizure, but rather whether a hearing to test probable cause should have been convened immediately after the seizure. At such time, there was no danger that the property would have disappeared given that it was in the government's custody.

Moreover, petitioners overlook that a neutral magistrate tested whether there was probable cause in *James Daniel Good Real Property* before the seizure. This Court found that *ex parte* process deficient to protect the significant property interest at stake, just as it found the prosecutor's involvement in *Gerstein* insufficient. Accordingly, the Court ordered that the government must not only subject a probable cause determination to a

magistrate's scrutiny, but that it must convene an adversary hearing prior to the seizure. Taken together, *Gerstein* and *James Daniel Good Real Property* provide that *pre*-seizure oversight by a neutral magistrate is required wherever practicable, and that prompt post-seizure oversight via a hearing is mandated in the exceptional contexts.

Petitioner also suggests (Br. at 42-43) that this Court should cloak real property with greater protection than personal property, whether diaries, automobiles, or cash. There is no question that law enforcement intrusion into the home is more invasive of privacy than a search of a car or even a briefcase in a public space. *Pa. v. Labron*, 518 U.S. 938, 940 (1996). And, law enforcement authorities may intercept conversations more readily in public spaces than they can in the home. *Katz v. United States*, 389 U.S. 347, 351 (1967). But, in the forfeiture context, the issue is not intruding into the home, but rather displacing an individual's ownership interest, just as for personal property. Indeed, one of the reasons why this Court has respected the sanctity of the home is to shield individuals' personal property from outsiders' gaze. In any event, a similar concern for evenhanded enforcement arises whether the seizure concerns real or personal property.[5]

At bottom, petitioner struggles to explain why, if a prompt post-seizure hearing is required in the arrest context under *Gerstein*, and if a *pre*-seizure hearing is required for seizure of real property in

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[5]Under the Due Process Clause, the Court has summarized that "[w]e are no more inclined than we have been in the past to distinguish among different kinds of property in applying the Due Process Clause." *North Ga. Finishing v. Di-Chem*, 419 U.S. 601, 608 (1975).

James Daniel Good Real Property, *no* probable cause hearing is required prior to or immediately after seizure of personal property. The potential for administrative overreaching is perhaps greatest in the personal property context given that law enforcement agencies stand to gain financially more from the seizure of automobiles and cash than from seizures of persons.

Petitioner and its amici largely ignore the Fourth Amendment's role in restraining law enforcement officials' discretion and instead argue that a trio of this Court's precedents dictate reversal of the lower court's holding. Petitioner relies (Br. at 29-45) heavily upon *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974), *United States v. $8850*, 461 U.S. 55 (1983), and *United States v. Von Neumann*, 474 U.S. 242 (1986), in arguing that the Constitution requires much less protection from seizure of personal property than from seizure of real property or of the person. *See also* Brief of the United States as Amicus 10-18 (stressing same cases). Reliance on that trio of cases is wholly unpersuasive for the question of probable cause arose in *none* of them.

In *Calero-Toledo*, the question was whether the constitutional rights of a yacht's lessor were violated when authorities seized his yacht after learning that a lessee was transporting narcotics on board. This Court specifically noted that the property owners in *Calero-Toledo* neither raised a Fourth Amendment challenge to the probable cause determination nor objected to the district court's conclusion that the state provided ample and prompt post-seizure process. 416 U.S. at 680 n.14. The Court instead held that no pre-seizure hearing was required because of the difficulty in ensuring that the

yacht would remain in the jurisdiction if notice were afforded. 416 U.S. at 679-80.[6]

In *$8850*, customs officials seized currency from a claimant as she passed through customs at the Los Angeles airport after arriving from Canada. The claimant never contested probable cause, but rather argued that the subsequent delay in the forfeiture hearing violated Due Process. Unlike in this case, law enforcement authorities promptly informed her that the seized currency was subject to forfeiture. 461 U.S. at 559. The Fourth Amendment question never arose.

Similarly, this Court's decision in *Von Neumann* in no way implicates the question of whether claimants are entitled to a probable cause hearing before a neutral magistrate promptly after the seizure. There, the property owner failed to declare at the U.S. border an automobile he purchased in Switzerland and picked up in Vancouver. U.S. customs authorities seized the car at the border because of that failure. Von Neumann never challenged the probable cause for the seizure and, accordingly, this Court had no reason to consider whether the Constitution requires a prompt probable cause determination as it does in the *Gerstein* and *James Daniel Good Real Property* contexts.[7]

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[6]The Court in *Calero-Toledo* also addressed the historic need for the government to retain the property in order to preserve *in rem* jurisdiction. 416 U.S. at 680. Petitioner does not argue here that government retention of personal property is essential to preserve jurisdiction.

[7]Indeed, the civil forfeiture hearing, despite petitioner's suggestion (Br. at 49) and that of the United States (Br. at 18), does not focus on whether the law enforcement official had probable cause at the time of seizure. Rather the question is

Petitioner also asserts (Br. at 60-65) that, because Illinois affords claimants separate avenues through which to reclaim property that has been seized, no probable cause hearing is required. Petitioner notes first that Illinois courts possess the equitable power to order a return of seized property. *People v. Moore*, 102 N.E.2d 146 (Ill. 1951); *People v. Kapande*, 177 N.E.2d 825 (Ill. 1961). Second, petitioner argues that the Illinois Law Enforcement Disposition of Property Act (LEDPA), 765 ILCS 1031/1, provides an additional means for property owners to sue for return of property in government possession.

The prospect of an equitable claim or discretionary statutory route for return of property, even if available,[8] in no way substitutes for a probable cause hearing. The question of probable

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whether, based on subsequent discovery and all evidence in the record, the government can demonstrate the requisite nexus between the wrongdoing and the seized property. Some confusion may exist because DAFPA utilizes the term "probable cause" to describe what the prosecution must demonstrate at the forfeiture proceeding to shift the burden to the claimant to "show[] by a preponderance of evidence that the claimant's interest in the property is not subject to forfeiture." 725 ILCS 150/9(G). Probable cause for the seizure represents a different evidentiary standard focused solely on the law enforcement officials' justification for seizure of the property.

[8]DAFPA may well have preempted such avenues. *See* 720 ILCS 570/550(d) (providing that property seized under DAFPA is subject only to order of the circuit court having jurisdiction over forfeiture proceeding). In any event, even before DAFPA, the court in *People v. Hermann*, 501 N.E.2d 842, 847 (Ill. App. 2d Dist. 1986), held that LEDPA was not the proper avenue for owners to seek return of property that had been seized in conjunction with criminal proceedings.

cause at the time of seizure is besides the point in such suits – rather, the question to be resolved is whether claimant has demonstrated enough hardship to justify return of the property despite the fact that a civil forfeiture case may be pending. Moreover, the equitable claim and LEDPA routes are anything but prompt, and law enforcement authorities may well seek to stay any claim pending resolution of the civil forfeiture proceeding itself.

Finally, petitioner asserts (Br. at 34-35) that the constitutional contours of civil forfeiture have been so long set in stone, that only a civil forfeiture proceeding need be provided to satisfy all constitutional concerns. Were that the case, however, *James Daniel Good Real Property* itself would need be overruled. In any event, Fourth Amendment determinations of reasonableness have always varied over time, as *Gerstein* exemplifies.[9] The effort to stamp civil forfeiture proceedings with the imprimatur of history is unavailing.

In sum, the reasonableness of any warrantless seizure of personal property hinges on whether the authorities have provided the owner prompt notice and an opportunity to contest the probable cause for the seizure before a neutral magistrate. Thus, as in *Gerstein*, this Court should find that the Fourth Amendment requires a prompt post-seizure hearing when the law enforcement officers' determination of probable cause has never been subjected to any

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[9]This Court has noted in the past that the Fourth Amendment's protections vary with time – The Amendment's prohibition against unreasonable searches and seizures must be interpreted "in light of contemporary norms and conditions." *Payton v. N.Y.*, 445 U.S. 573, 591 n.33 (1980).

judicial oversight.

The question of what procedures to deploy at the probable cause hearing is less clear cut. In *Gerstein* this Court required a nonadversary hearing, while in *James Daniel Good Real Property*, this Court required a full adversary hearing prior to the seizure. For reasons sketched below, this Court should choose an intermediate path for the forfeiture of personal property, providing an informal opportunity for claimants known at the time to contest the probable cause for the seizure.

B. Due Process Clause

The Due Process Clause helps determine the procedures required to protect property owners. As the *James Daniel Good Real Property* Court stressed, the Due Process Clause imposes obligations upon the government over and above those in the Fourth Amendment when seizing private property in the forfeiture context: "Here the Government seized property not to preserve evidence of wrongdoing, but to assert ownership and control over the property itself. Our cases establish that government action of this consequence must comply with the Due Process Clauses of the Fifth and Fourteenth Amendments." 510 U.S. at 52. *See also Soldal v. Cook County*, 506 U.S. 56, 70 (1992) ("Certain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution's commands. . . we examine each constitutional provision in turn.").

The touchstone of the Due Process Clause is notice and an opportunity to be heard, protections overlapping but not congruent with those of the Fourth Amendment. The government can interfere with property rights only after affording property owners prompt notice and an opportunity to contest the government's right to deprive them of the

property interest. *Loudermill v. Cleveland Bd. of Educ.*, 470 U.S. 532 (1985); *Mathews v. Eldridge*, 424 U.S. 319 (1976). DAFPA, however, assures property owners neither prompt notice of the deprivation, nor a prompt opportunity to challenge the legitimacy of the deprivation. Yet, as the Court noted in *Fuentes v. Shevin*, 407 U.S. 67, 80-81 (1972), due process "protect[s] his use and possession of property from arbitrary encroachment -- to minimize substantive unfair or mistaken deprivations of property."

With respect to notice, law enforcement authorities under DAFPA need not notify owners as to the seizure for months. Rather, law enforcement authorities must notify the State's Attorney's Office within 52 days of the seizure. 725 ILCS 150/5. Then, the State's Attorney has another 45 days to provide notice to "all known interest holders of the property." 725 IlCS 150/6(A). Thus, no notice to the owners likely will be provided under the Act for over three months. An owner who has leased a car or boat may not even realize that his or her property has been seized by government authorities for that protracted period of time. Such was the factual context in *Calero-Pearson*.[10] His or her ability to prepare a defense may be compromised by that delay. On that basis alone, Illinois' scheme is deficient.

Moreover, if claimants prevail at the ultimate forfeiture proceeding, DAFPA does not require petitioner to pay for any damages arising out of the seizure – neither for the inability to use the property

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[10]Ironically, the government in *Calero-Toledo* provided prompt notice to all known owners immediately after seizure. Unlike in this case, therefore, there was no issue as to the adequacy of post-seizure process.

nor for the property's depreciation. Indeed, DAFPA dictates that law enforcement authorities retain ten percent of the cost bond even when a court determines that forfeiture is inappropriate and orders return of the property. 725 ILCS 150/6(C)(3).

This Court has held in a wide variety of contexts that, when a pre-deprivation hearing is not practical, a prompt post-deprivation opportunity to be heard is required. For instance, in *C.I.R. v. Shapiro*, 424 U.S. 614, 629 (1976), the Court held that, in light of the government's seizure of bank accounts, "the Due Process Clause requires that the party whose property is taken be given an opportunity for some kind of predeprivation or prompt post-deprivation hearing at which some showing of the probable validity of the deprivation must be made." In *Barry v. Barchi*, 443 U.S. 55, 63-64 (1979), the Court held that a "sufficiently timely postpsuspension hearing" was required given that no hearing was mandated prior to the suspension. *See also North Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 607 (1975) (holding that IRS must provide prompt hearing at which IRS must prove "at least probable cause" for its claim).

The United States, however, surprisingly argues (Br. at 23) that the teachings of *C.I.R. v. Shapiro* and *Barry v. Barchi* should be ignored here "because only a small minority of forfeitures are actually contested, even after the government identifies and notifies potentially interested parties." Post-deprivation hearings cannot be jettisoned, however, merely because some claimants waived their right to a hearing. Indeed, this Court mandated hearings in *Gerstein* even though many of those arrested previously did not challenge the probable cause for their arrest, and this Court

mandated pre-deprivation hearings in *James Daniel Good Real Property* despite the fact that many in that forfeiture context did not contest probable cause for the seizure. In *Mathews v. Eldridge* itself there was no showing of the number of claimants who previously contested the SSA's decision to curtail their benefits eligibility. Due Process turns not on an empirical showing of how many claimants in the past have utilized a particular process, but rather on whether the individual interest at stake and potential for error outweigh the government's interest in not providing for the procedures requested. Moreover, if the United States is correct in assuming that many claimants will not avail themselves of a prompt post-seizure hearing, then the governmental interest in not offering a hearing is diminished.

Whatever test is selected to assess the process that is due must focus on whether notice and opportunity for a hearing to test "the probable validity" (*C.I.R. v. Shapiro*, 424 U.S. at 629) for the seizure should be provided. Given the delay in notice, coupled with the delay in affording an opportunity to contest the seizure, DAFPA plainly is deficient. As the *James Daniel Good Real Property* Court asserted, "[t]he right to prior notice and a hearing is central to the Constitution's command of due process." 510 U.S. at 53.

1. Applicability of *Mathews v. Eldridge*

This Court has used the *Mathews v. Eldridge* framework in evaluating a wide variety of civil cases in which private parties seek to protect their property interests from government interference. For instance, in *Mathews* the question was deprivation of social security benefits; in *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305

(1985), the question was conferral of veterans benefits; and in *Loudermill*, 470 U.S. 532 (1985) the issue was one of continuing in a government job.

This case similarly demands an assessment of whether law enforcement authorities must afford notice and an opportunity to respond before individuals can be deprived of property for upwards of a year. Lower courts have interpreted *James Daniel Good Real Property* and comparable cases to require utilization of *Mathews v. Eldridge* in the civil forfeiture context to determine whether a prompt post-seizure hearing should be held. *See, e.g.*, *Krimstock v. Kelly*, 306 F.3d 40, 70 (2d Cir. 2002) (application in forfeiture hearing); *Coleman v. Watt*, 40 F.3d 255, 260 (8th Cir. 1994) (same); *Propert v. District of Columbia*, 948 F.2d 1227, 1331 (D.C. Cir. 1991) (application in case challenging destruction of seized "junk" vehicles). Although some lower courts, as petitioner urges here, have shrugged off *Mathews v. Eldridge* in considering whether a forfeiture hearing has been delayed excessively (*see, e.g., Nnadi v. Richter*, 976 F.2d 682 (11th Cir. 1992)), none has rejected *Mathews v. Eldridge* when considering whether due process mandates a post-seizure hearing to assess whether probable cause exists for the seizure.

The analysis in *Krimstock* presents an illustrative example. There, in considering seizure of motor vehicles of those accused of driving while intoxicated, the court held that "plaintiffs' claim does not concern the speed with which civil forfeiture proceedings themselves are instituted or conducted. Instead, plaintiffs seek a prompt post-seizure opportunity to challenge the legitimacy of the City's retention of the vehicles while those proceedings are conducted. The application of the speedy trial test

presumes prior resolution of any issues involving probable cause...." The court continued that the Constitution "distinguishes between the need for prompt review of the propriety of continued government custody, on the one hand, and delays in rendering final judgment, on the other." Accordingly, the court applied *Mathews v. Eldridge* in concluding that a prompt post-seizure hearing was constitutionally required.

To be sure, this Court has recognized narrow contexts in which *Mathews v. Eldridge* is not appropriate. For instance, in determining the type of notice that is required, as opposed to the procedures to utilize at a proceeding, the Court in *Dusenbery v. United States*, 534 U.S. 161 (2002), used a test borrowed from *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314.[11]

As a general matter, however, the *Mathews v. Eldridge* test has broad salience. Indeed, in *Hamdi v. Rumsfield*, 542 U.S. 507, 528-29 (2004), the Court relied on *Mathews v. Eldridge* in ruling that a U.S. citizen held as an enemy combatant be afforded an opportunity to contest the factual basis of his detention: "The ordinary mechanism that we use for balancing such serious competing interests, and for determining the procedures that are necessary to ensure that a citizen is not deprived of life, liberty, or property, without due process of law . . is the test that we articulated in *Mathews v. Eldridge*." *Id.*

Thus, as this Court stated in *James Daniel*

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[11]Should the issue be which steps the government must take to notify claimants of the seizure, then *Mullane* might be relevant. *Mullane*, however, does not pertain to the antecedent question of whether a hearing is needed and, if so, what procedures should be used.

Good Real Property, 510 U.S. at 53, the familiar balancing test in *Mathews v. Eldridge* "provides guidance" in civil forfeiture proceedings. The court of appeals therefore correctly focused on the three *Mathews v.* Eldridge factors: the private interest affected; the risk of erroneous deprivation through the procedures used and the value of other safeguards; and the government's interest in withholding the additional procedures requested.

a. The Private Interest at St.

This Court on prior occasions has held that even temporary intrusions into private ownership of property can constitute a significant hardship. In *Connecticut v. Doehr*, 501 U.S. 1, 24 (1991), for instance, the Court held that Connecticut's lack of procedures to protect property owners from pre-judgment attachment violated the Due Process Clause. Similarly, in *Fuentes*, 407 U.S. at 89-90, the Court invalidated a state replevin provision that permitted vendors to have goods such as kitchen utensils and household furniture seized through an *ex parte* application. *See also North Ga. Finishing v. Di-Chem*, 419 U.S. 601, 608 (1975) (holding that Due Process protects against temporary block on banking account).

As the lower court noted in this case, temporary displacement of ownership of personal goods such as automobiles can have a profound impact on individuals' lives: "Our society is, for good or not, highly dependent on the automobile. The hardship posed by the loss of one's means of transportation, even in a city like Chicago, with a well-developed mass transportation system, is hard to calculate." 524 F.3d at 838. Thus, although the interest affected here may not be as strong as when liberty itself is threatened (*see, e.g., Wash. v. Harper*,

494 U.S. 210, 221-222 (1990)), respondents' ability to work and to take care of their families can be compromised by seizure of their vehicles or other personal property for an extended length of time. Under DAFPA, the period of deprivation may well extend beyond a year. 725 ILCS 150/6.

The individual interest runs deeper. Not only are individuals deprived of use of personal property for protracted periods of time, but the value of goods in law enforcement hands depreciates rapidly. *See, e.g., Krimstock*, 306 F.3d at 62. Although cash seized may not depreciate much, depending on inflation, the value of a yacht or automobile de-escalates quickly.

Moreover, unlike in cases such as *Mathews*, 424 U.S. at 340, and *Walters*, 473 U.S. at 327, there is no statutory mechanism by which claimants can recover back benefits when they ultimately prevail. Under DAFPA, the claimant will not be able to receive compensation for the interim loss if ultimately vindicated.[12] Thus, respondents face irreparable loss from DAFPA's delay, and therefore the individual interest at stake is considerable.

b. The Risk of Error

The second *Mathews v. Eldridge* factor weighs heavily in favor of the court's decision below. What petitioner and the United States as amicus ignore is that DAFPA provides no mechanism to ensure that an independent magistrate assess the probable validity for the seizure. Indeed, in *James Daniel Good Real Property*, the statute provided for an *ex*

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[12]In contrast, under the Civil Asset Forfeiture Reform Act of 2000, the government must pay reasonable fees, costs, and interest on seized cash to a prevailing claimant. 28 U.S.C. 2465(b)(1).

parte proceeding prior to the seizure, yet the Court nonetheless found that the potential for error was too large. 510 U.S. at 55. Given this Court's determination that, to protect against a risk of error, a full adversary hearing must be held prior to seizures of real property, then the risk of error in withholding review by a neutral magistrate for seizures of personal property is intolerable. Similarly, *ex parte* proceedings existed in *Doehr*, 501 U.S. at 24, and in *Fuentes*, 407 U.S. at 96-97, and yet the Court in those cases held that greater process before the seizure was due. Here, the potential for error is far greater because *no* means exist to test the law enforcement officials' probable cause determination if a prompt post-seizure hearing is not required. As this Court asserted in *James Daniel Good Real Property* "'[f]airness can rarely be obtained by secret, one-sided determination of facts decisive of rights.'" 510 U.S. at 55 (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1951) (Frankfurter, J., concurring).

Law enforcement officials, in the midst of narcotics investigations, must make a heat-of-the moment determination as to the connection between personal property such as a car and a narcotics transaction. Probable cause requires a determination of "reasonable grounds for the belief that there exists a nexus between the property and illegal drug activity, supported by less than prima facie proof but more than mere suspicion." *People v. 1945 N. 31st St.*, 841 N.E.2d 928, 942 (Ill. 2005) (emphasis omitted). Circumstances may be hazy, and the role that personal property plays in the transaction can be difficult to ascertain. For instance, to what extent did the car ferry the

participants or haul the contraband?[13] Did the suspects use proceeds of drug transactions or other funds to purchase a car?[14] Law enforcement authorities acting in good faith readily can misgauge the nature of the connection.

Petitioner seems to acknowledge the significant risk of error when it represents (Br. at 64 n.6) that, after the State's Attorney provides notice of the seizure to known stakeholders and discusses the facts, the State's Attorney "either settles or rescinds the majority of the adverse forfeiture cases." Thus, on a voluntary basis, the State's Attorney months later provides the same notice and opportunity to be heard that the court below has directed in this case. As petitioner relates, that opportunity to be heard has produced significant results in terms of returned property.

Moreover, there is yet another reason to question the law enforcement authorities' actions.

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[13]Such factors have featured prominently in the hearings under *Krimstock* as explored in Gregory L. Acquaviva & Kevin M. McDonough, *How to Win a Krimstock Hearing: Litigating Vehicle Retention Proceedings Before New York's Office of Administrative Trials and Hearings*, 18 WIDENER L.J. 23 (2008). See, *e.g.*, *Police Dep't v. Williams*, Office of Administrative Trials and Hearings, Index No. 1899/04, slip op. 4-5 (no probable cause to show that vehicle was used in ferrying narcotics that were found in home; *Police Dep't v. Mercedes*, Office of Administrative Trials and Hearings, Index 330/07(finding insufficient evidence that particular vehicle was instrumental in carrying narcotics).

[14]*See, e.g.*, *People v. $1,124,905 U.S. Currency & One 1988 Chevrolet Astro Van*, 685 N.E.2d 1370, 1382 (Ill. 1997) (currency must be connected to illegal narcotics trafficking). *See also United States v. $506, 231 in U.S. Currency*, 125 F.3d 442, 452 (7th Cir. 1997); *United Sates v. $121,100 in U.S. Currency*, 999 F.2d 1503 (11th Cir. 1993).

Under DAFPA, authorities recognize that their departments realize a percentage of any financial gains from a forfeiture.[15] 720 ILCS 570/505(g) (allotting 65% to local law enforcement groups participating in investigation giving rise to the forfeiture). Law enforcement authorities, themselves, in other words, are not disinterested bystanders. This Court stated in *James Daniel Good Real Property* that "[t]he purpose of an adversary hearing is to ensure the requisite neutrality that must inform all governmental decision-making. That protection is of particular importance here, where the Government has a direct pecuniary interest in the outcome of the proceeding." 510 U.S. at 55-56. As Justice Scalia commented in *Harmelin v. Michigan*, 501 U.S. 957, 979 n.9 (1991), "[i]t makes sense to scrutinize governmental action more closely when the State stands to benefit." (Opinion of Scalia, J.).

c. The Government Interest

Finally, the government's interest in delay is limited. Unlike in *Calero-Toledo*, the government has no interest in keeping its designs on the property secret, for it has already seized the property. All that is at stake is the time and expense in not having to convene a neutral magistrate to review the probable cause evidence. And, while respondents must be able to present evidence, a formal evidentiary hearing is not required. The purpose of the probable cause hearing is not to determine whether forfeiture should

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[15]The potential for financial gain may skew law enforcement in many ways, prompting law enforcement authorities to structure enforcement activities in ways to capture assets for their departments. Abuses have been legion. *See generally* Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35 (1998).

be granted, as petitioner assumes (Br. at 45, 47), but rather to determine whether the law enforcement authorities made a plausible determination at the time of seizure as to the nexus between the illegal activity and the property seized.

At times, petitioner suggests (Br. at 37, 66-68) that a civil forfeiture proceeding may interfere with a pending criminal case. But, petitioner has not explained its concern. Disclosure of evidence of the nexus between the property and narcotics activity should not compromise a subsequent criminal case, and oversight is commonplace under *James Daniel Good Real Property*. If exceptional circumstances arise, courts might proceed by considering evidence *in camera*.

In addition, prompt post-deprivation hearings are a familiar part of the legal landscape. As the amicus Brief of the States of Illinois, et al. points out, forfeiture schemes in Arizona, Georgia, Kansas, Louisiana, Nebraska, North Carolina, Ohio, Oregon, and South Carolina require or permit some form of preliminary hearing.[16] Moreover, under Florida's scheme, the government must afford notice of any seizure within five business days afterwards and then hold an adversarial preliminary hearing within ten days after a request from a claimant. Fla Stat. Ann § 932.703(2)(a).

Perhaps of greater relevance, Illinois itself requires preliminary hearings in a wide array of

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[16] *See generally* ARIZ. REV. STAT. § 13-4310(B); GA. CODE ANN. § 16-13-49(q)(4); KAN. STAT. ANN. § 60-4112(c); LA. REV. STAT ANN. § 40:2611.C; NEB. REV. STAT. § 28-431(4); N.C. GEN STAT. §§18B-504(h); OHIO REV. CODE ANN. § 2981.03 (A)(4); OR. REV. STAT. § 475A.045(8); S.C. CODE ANN. §§ 44-53-586(a).

related forfeiture schemes.[17] As one example, Illinois' Narcotics Profit Forfeiture Act, which serves essentially the same purpose as DAFPA, requires a preliminary hearing prior to forfeiture requiring the state to show probable cause that the parties charged engaged in narcotics racketeering and also that the property in question is sufficiently connected to the illegal activity. 725 Ill. Comp. Stat. 175/5 (2009). In other words, Illinois has authorized preliminary hearings in contexts comparable to DAFPA, and petitioner has not shown that such hearings overwhelm the system.

Moreover, in the City of Chicago, preliminary hearings are routinely provided after seizure of motor vehicles that contain a banned substance or are used in connection with the sale of a banned substance. CHICAGO, ILL., MUN. CODE § 7-24-225 (2008). At most, owners are subject to a $1000 fine and applicable towing and storage charges. Upon seizure, police officers must "notify any person identifying himself as the owner of the vehicle or any person who is found to be in control of the vehicle at the time of the alleged violation . . . of the fact of the seizure and of the vehicle owner's right to request a preliminary hearing." *Id.* at § 7-24-225. Thousands of hearings are adjudicated each year.[18] Ironically,

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[17] *See, e.g.*, 305 ILL. COMP. STAT. 5/8A-7 (2009) (providing prompt post-deprivation hearing for the revocation of public assistance benefits obtained fraudulently); 720 ILL. COMP. STAT. 5/10A-15 (2009) (prompt hearing required for the seizure of property related to human trafficking); 720 ILL. COMP. STAT. 5/11-20.1A (2009) (for the seizure of property related to sexual offenses against minors); 720 ILL. COMP. STAT. 5/29D-65 (2009) (for the seizure of property related to acts of terrorism); 720 ILL. COMP. STAT. 5/37.5-20 (2009) (for the seizure of property related to illegal animal fighting).

[18] According to the Department of Administrative Hearings, the

petitioner challenges the role of preliminary hearings here despite the fact that similar hearings routinely are convened when a fine only up to a maximum of $1000 is at stake.

On balance, therefore, the *Mathews v. Eldridge* factors strongly point toward a prompt post-seizure hearing to assess probable cause for the seizure. Control over personal property such as cars is critical in our society, and there is significant risk that law enforcement officials err in assessing probable cause. Prompt notice and an opportunity to be heard on the probable cause issue neither jeopardizes the government's control over the property nor infringes on any legitimate law enforcement objective. As the court below directed, "the hearing should be prompt but need not be formal. . . . We do not envision lengthy evidentiary battles which would duplicate the final forfeiture hearing." 524 F.3d at 838-39. Rather, what is key is "notice to the owner of the property and a chance, perhaps rather informal, to show that the property should be released." *Id.* at 838. The Due Process Clause analysis dovetails with that under the Fourth Amendment. The court below correctly concluded that *some* oversight of the law enforcement authorities' determination of probable cause is constitutionally mandated.

Office processed, under this ordinance, 13,969, 13,485, and 14,726 hearings in 2005, 2006 and 2007, respectively. E-mail from Margaret Gavin, Department of Administrative Hearings, City of Chicago, to Tom Gaylord, Reference Librarian, Chicago-Kent College of Law (July 28, 2009, 13:46 CDT).

2. *Barker v. Wingo* Analysis.

Petitioner asserts (Br. at 36-37), that, despite this Court's deployment of *Mathews v. Eldridge* in *James Daniel Good Real Property*, the Court should displace that test in favor of the one developed in *Barker v. Wingo*, 407 U.S. 514, 530 (1972), to assess whether an individual's right to a speedy trial has been violated. The *Barker v. Wingo* test turns on the length of the delay, the reason for the delay, defendant's assertion of the right, and prejudice to the defendant. 407 U.S. at 530. Petitioner correctly notes that this Court, prior to *James Daniel Good Real Property*, utilized *Barker v. Wingo* in determining whether the delays in *Von Neumann* and in *$8850* were too lengthy. *See, e.g., Von Neumann, 474 U.S.* at 248-49.

Petitioner errs, however, in steadfastly maintaining that this case is only about delay. Rather, the question, as in *Gerstein*, is whether respondents are entitled to a prompt post-seizure hearing as to the existence of probable cause for the seizure. The issue of whether probable cause for the seizure existed *never* is resolved directly at the civil forfeiture hearing. Rather, the question determined is whether law enforcement authorities, *at the time of the forfeiture hearing*, have sufficient evidence to demonstrate the nexus between the criminal activity and the property seized. Indeed, petitioner has maintained that one of the reasons to forego a prompt post seizure hearing is to permit the government to collect more evidence demonstrating that relationship. The statute provides that "the court must receive and consider, among other things, all relevant hearsay evidence and information." 725 ILCS 150/9(B). *See, e.g., People v. $52,204*, 623 N.E.2d 959, 960-61 (Ill. App. 1993) (relying on

information developed after seizure to demonstrate probable cause). Thus, unlike in *Barker v. Wingo*, and more importantly, unlike in *Von Neumann* and *$8850*, the question in this case is not about delay but about respondents' due process right to a prompt adjudication of whether law enforcement officials were entitled under the Constitution to disturb their property rights.

Barker v. Wingo is inapt for yet another reason. The test's application is binary – either there is too much delay or not. Application of the test does not generate answers as to what type of procedures to use at a hearing, or who can participate. Timing is only one component of many facets of a hearing that can be ascertained using *Mathews v. Eldridge*. Thus, the court below correctly determined that *Mathews v. Eldridge* governs the process due, and application of the relevant factors strongly support the court's decision below.

II

DAFPA CREATES A PROPERTY INTEREST IN INNOCENT OWNERS OF PROPERTY OTHERWISE SUBJECT TO FORFEITURE, AND THAT INTEREST IS PROTECTED BY THE DUE PROCESS CLAUSE

In addition to affording claimants the ability to contest the probable cause for the forfeiture, the court below also held that so-termed "innocent owners" be permitted to present evidence to an independent judicial official of their entitlement to retain the property despite the probable cause for the seizure. Although the court did not explain its decision in great depth, it evidently relied on the fact that DAFPA vests in innocent owners a property interest that is protected under the Due Process

Clause. Under *Mathews v. Eldridge*, such property owners should be afforded an informal opportunity to present evidence of their "innocent" status promptly after any seizure.

A. Creation of the Property Interest

Petitioner (Br. at 54-56) argues that no process need be afforded to "innocent owners" of property subject to forfeiture because there is no constitutional right to present such a defense under *Bennis v. Michigan*, 516 U.S. 442 (1996). But petitioner has ignored that, even though not constitutionally required, the Illinois General Assembly has created a property interest in innocent ownership that is protected under the Due Process Clause. DAFPA grants individuals the right to continued ownership if they can show that they are "not legally accountable for the conduct giving rise to the forfeiture, did not acquiesce in it, and did not know and could not reasonably have known of the conduct or that the conduct was likely to occur." 725 ILCS 150/9.

In *Board of Regents of State Colleges v. Roth*, this Court held that a state creates a property right when it constrains its discretion so as to give rise to "a legitimate claim of entitlement." 408 U.S. at 577. The Court continued that "[i]t is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined." *Id.* Entitlements do not flow from an "unilateral expectation," but from "existing rules and understandings." *Id.*

Unlike in Michigan,[19] the Illinois General

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[19]Michigan's legislature provided that "[p]roof of knowledge of the existence of the nuisance on the part of the defendants or any of them, is not required." Mich. Comp. Laws

Assembly has vested in property owners the right to continued ownership in one set of circumstances even when the property is otherwise subject to forfeiture. The General Assembly can repeal the innocent owner provision, or make the proceeding more discretionary, as with petitions for remission.[20] Absent change, however, it has seen fit to create a property interest, and due process protects such "innocent owners" in their efforts to demonstrate continued ownership.[21]

The employment context presents a close analogy. Many states create not only an entitlement to be considered for a job, as with a civil service examination, but also a right to continued retention of the job absent cause for discharge. In both the property and employment contexts, in other words, legislatures have provided that individuals can rely on continuation of that benefit unless they are not innocent owners in the first example, and unless in the second context their performance in the

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§ 600.3815(2). As Justice Thomas noted in concurrence in *Bennis*, "[w]hen the property sought to be forfeited has been entrusted by its owner to one who uses it for crime . . . the Constitution apparently assigns to the States and to the political branches of the Federal Government the primary responsibility for avoiding that result." 516 U.S. at 456-57. Illinois has attempted to "avoid[] that result" by creating the property interest described above. As the United States notes in its brief (at 32), innocent owner provisions "illustrate the care with which Congress and many state legislatures have crafted protections for forfeiture claimants over and above what the Constitution requires."

[20]*See* LEDPA, 765 ILCS 1030/1.

[21]As in Michigan, the relevant statute in *Calero-Toledo* did not create a property interest in "innocent owners." 34 P.R. Laws Ann. § 1722 (repealed 1998).

job has been faulty.

Consider this Court's decision in *Cleveland Board of Education v. Loudermill*, 470 U.S. at 532 . There, the Court considered whether plaintiffs "had a property right in continued employment." *Id.* at 538. The Court found that Ohio had plainly created such an interest by providing that certain employees were "entitled to retain their positions 'during good behavior and efficient service.'" Although Ohio's legislature could change its mind in the future and determine that the public interest no longer favored a right to continued employment, until that time the state could not take the property right away without affording due process.[22]

The same result should apply here. Illinois has created a property right in continued ownership of property. The question is what process is due.

B. **Application of *Mathews v. Eldridge***

There is no question but that *Mathews v. Eldridge* frames the question as to what procedures the state must use in determining whether to take away an individual's right to continued ownership of property. The *Barker v. Wingo* test plainly has no relevance in resolving the means by which an individual can vindicate a state-created property interest. Thus, the court below was correct in analyzing the private interest affected; the risk of erroneous deprivation through the procedures used; and the government's interest in withholding the additional procedures requested.

Resolving the *Mathews v. Eldridge* calculus in this context is very similar to that in determining the

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[22]Similarly, in *Mathews v. Eldridge* itself, the Court protected an individual's right to *continued* social security benefits – the only question was what process was due.

procedures to use at the probable cause hearing. First, as discussed previously, the interest in continued ownership of property is significant. In *Fuentes*, 407 U.S. at 89, the Court recognized the importance of control over personal property to one's livelihood and family. The court below stressed how critical continued ownership of automobiles can be in this society. With each passing month, the deprivation can take a greater toll on family and job, and the value of the personal property seized declines markedly. Nor is there any mechanism under DAFPA through which to recover for the damages suffered during the delay.

The second *Mathews v. Eldridge* factor weighs heavily in favor of the court's decision below. Until the forfeiture hearing itself, neither the law enforcement officials nor the prosecutors make an independent determination as to innocent owner status. They are concerned only with probable cause for the seizure, not with whether an individual should be considered "blameless" for the particular use of property. The potential for error is great because, in the absence of the prompt post-seizure hearing, no means exist under Illinois law to determine whether the state-created property right in continued ownership should be honored. Indeed, petitioner has conceded (Br. at 64 n.6) that, months after the seizure, the State's Attorney "either settles or rescinds the majority of adverse forfeiture cases." Presumably, the State's Attorney concludes in a significant percentage of those cases that it should recognize innocent owner status.

If a mechanism existed to resolve claims of innocent owner status earlier, therefore, many individuals would be able to enjoy their state-created right to continued ownership earlier with less

financial hardship. Delay merely affords law enforcement authorities a lever with which to pry a more favorable settlement from the true owner and, in so doing, financially benefit their own department.

Finally, the government's interest in delay is limited. The United States suggests that the government must have time to investigate all claims of ownership so as not to have to schedule a series of hearings. The decision of the court below is not inconsistent with that concern. The prompt hearing on innocent owner status, as contemplated by the court below, would be relatively brief and available only to those claimants who were reasonably known immediately after the seizure.

Given that the government must provide a prompt post-seizure hearing to test probable cause, the limited expansion of the hearing to include claims of innocent ownership should impose only a modest additional cost. The neutral magistrate would make a finding whether, as a preliminary matter, innocent owner status was highly likely to be determined later at the civil forfeiture hearing.[23] In those cases in which the extant information clearly showed that, despite probable cause for the seizure, the owner had no connection to the unlawful activity, the property should be promptly returned. As the State's Attorney implies in her brief, she already has pursued this route, but as a discretionary matter some months after the seizure. Formalizing the process would only ensure equal treatment at an

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[23]New York City, in the wake of *Krimstock*, essentially followed this tack, affording individuals the right to demonstrate innocent owner status at an abbreviated informal hearing. *See How to Win a Krimstock Hearing*, *supra*, note 15, at 72-73.

earlier time. The state could condition return of the property on a bond requirement (as under CAFRA[24]) to protect itself in case it decided to pursue the forfeiture route. Illinois currently conducts numerous preliminary hearings in closely related contexts. *See supra* note 17.

On balance, therefore, the *Mathews v. Eldridge* factors militate for holding a prompt post-seizure hearing, both to test the probable cause legitimating the seizure, and to afford so-termed innocent owners the opportunity to vindicate their state-created property entitlement. Control over personal property such as cars is critical in our society, and the hearing would present the first occasion for law enforcement officials to consider innocent owner status. Although the government would prefer to dispense with any prompt consideration of innocent owner status, affording immediate notice and an opportunity to be heard neither jeopardizes its control over the property nor adds that significantly in terms of administrative expense.

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[24]*See* 19 U.S.C. § 1614 (authorizing release of personal property on condition of payment of appraised value).

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the court below.

Respectfully submitted,

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